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NORTH CAROLINA REPORTS.

VOL. 91.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

OCTOBER TERM, 1884.

REPORTED BY
THOMAS S. KENAN.

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1884.

Rec. Jan. 28, 1896

JUSTICES OF THE SUPREME COURT,

February Term, 1884.

CHIEF JUSTICE :

WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES :

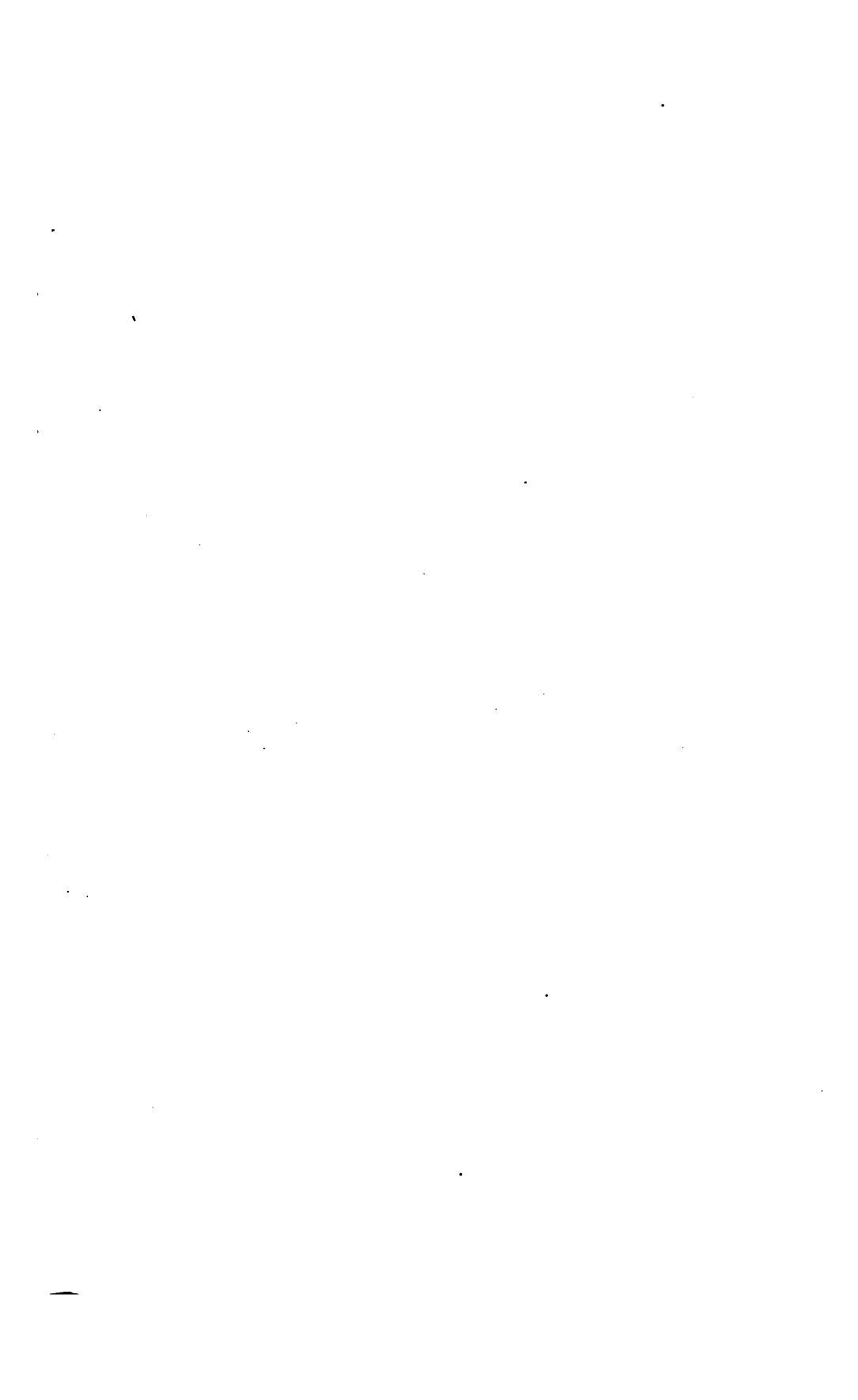
THOMAS S. ASHE, AUGUSTUS S. MERRIMON.

CLERK OF THE SUPREME COURT.....WILLIAM H. BAGLEY.

MARSHAL OF THE SUPREME COURT.....ROBERT H. BRADLEY.

ATTORNEY-GENERAL :

THOMAS S. KENAN.



JUDGES OF THE SUPERIOR COURT.

JAMES E. SHEPHERD, 1st Dist.	JOHN A. GILMER, 5th Dist.
FREDERICK PHILIPS, 2d "	WILLIAM M. SHIPP, 6th "
ALLMAND A. MCKOY, 3d "	JESSE F. GRAVES, 7th "
JAMES C. MACRAE, 4th "	ALPHONSO C. AVERY, 8th "
JAMES C. L. GUDGER, 9th Dist.	

SOLICITORS.

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SWIFT GALLOWAY, 3d "	JOSEPH DOBSON, 7th "
JAMES D. MCIVER, 4th "	JOSEPH J. ADAMS, 8th "
GARLAND S. FERGUSON, 9th Dist.	

JUDGE OF THE CRIMINAL COURT.

OLIVER P. MEARES..... Wilmington.

SOLICITOR.

BENJAMIN R. MOORE..... Wilmington.

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LICENSED ATTORNEYS.

October Term, 1884.

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JOHN F. BRUTON,
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ERRATTA.

Mr. Justice MERRIMON, having been of counsel, did not sit on the hearing of the case of *Arrington v. Arrington*, 301.

- Page 61 line 4 of last paragraph for "appearing" read "opposing."
- " 93 " 7 for "affect" read "effect."
- " 97 " 13 read "life estate in the remainder."
- " 101 " 2 of the opinion omit "not."
- " 176 last line, for "under" read "and."
- " 177 line 14 for "not" read "only."
- " 193 " 3 second paragraph of opinion for "merely" read "entirely."
- " 241 " 10 second paragraph insert "latter" before "proposition."
- " 262 " 8 fourth paragraph for "when" read "where."
- " 290 " 1 fifth paragraph for "probably" read "properly."
- " 327 " 12 for "therein" read "thereon."
- " 328 " 6 for "so" read "as."
- " 328 " 2 second paragraph for "much" read "more."
- " 408 " 3 for "1865" read "1855."
- " 579 " 3 third paragraph, for "self-evidence" read "self-defence."
- " 593 " 2 second paragraph, after "1868," insert "and the act."

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

OCTOBER TERM, 1884.

OFFICERS OF COURT AND HARRY SKINNER v. THEOPHILUS BLAND.

Appeal—Certiorari.

The rule in reference to an oral waiver of the statutory mode of appeal, announced in *Adams v. Reeves*, 74 N. C., 106, and the case heres cited, approved.

(*Adams v. Reeves*, 74 N. C., 106; *Rouse v. Quinn*, 75 N. C., 354; *Walton v. Pearson*, 82 N. C., 464; *Holmes v. Holmes*, 84 N. C., 833; *Scroggs v. Alexander*, 88 N. C., 64; cited and approved.)

PETITION of defendant for writ of *certiorari*, heard at October Term, 1884, of THE SUPREME COURT.

See same case, reported in 87 N. C., 168, and 90 N. C., 6.

Messrs. Strong & Smedes, for petitioner.

Messrs. Haywood & Haywood, contra.

SMITH, C. J. The appeal in this case was dismissed at the last term of this court for the reason that it was not prose-

OFFICE v. BLAND.

cuted and the transcript filed for docketing at the term next succeeding that of the superior court at which the appeal was entered.

The case is again brought before us on an application for a writ of *certiorari* to bring up the record in order that it may be heard, based upon an alleged waiver of a strict observance of the rule prescribed in the Code of Civil Procedure for making the appeal effectual in the appellate court.

Accompanying the sworn petition are affidavits of the petitioner's counsel, which set out certain communications had with the plaintiff Skinner, from which they were induced to believe, and did believe, that a compliance with the provisions of the statute would not be insisted on, more especially as to the limitations of time, and consequently they were not strictly pursued in the preparation of the appeal and transmission of the record to this court. No positive agreement to this effect is stated in either affidavit, nor any facts from which a waiver can be inferred, except that Skinner expressed dissatisfaction at the statement of the case as made up, without intimating his intention to avail himself of the delay, and that in October he agreed that the argument might be postponed to the February term of the court. This agreement seems to have been understood by the affiant to embrace everything necessary to the constitution of the cause in this court, and its being heard upon its merits when reached.

The affidavits of Skinner, several in number, meet these allegations with an explicit and direct denial, except so far as relates to the deferring the argument in the cause, swearing that no waiver was consented to, nor intended, nor understood by himself to have been consented to, of any of the statutory requirements for perfecting the appeal, or any of his rights of exception to any omission to observe them.

While it may be true that counsel were misled into the

OFFICE v. BLAND.

belief that the restrictions of the statute as to time would not be relied on, and perhaps this was not an unreasonable inference from all that transpired in reference to the appeal, there are other deviations in the course of proceeding, such as the failure to give a sufficient undertaking to secure the costs, which do not admit of the excuse.

Besides, the alleged waiver was many months after the imputed omissions, and could not have prevented the appellant from complying with the terms of the statute; and hence, as the alleged understanding was, not to insist on certain legal rights after they had accrued, we cannot refuse to allow them when demanded, upon a suggestion that counsel without consideration promised not to press them, since he has not misled thereby to any neglect that otherwise might have been avoided.

It is, however, a well settled rule, not to inquire into and ascertain disputed facts, in a controversy as to whether there has been a waiver of the provisions of the statute, when it is raised by repugnant affidavits of the opposing parties and rests in parol. In such cases, the writ issues as a substitute for a lost appeal only when warranted by the evidence proceeding from the contesting party, in analogy to the relief given upon the "equity confessed" in an answer. The rule, as applicable to verbal agreements, rests upon numerous adjudications, and is salutary in its operation in practice. *Adams v. Reeves*, 74 N. C., 106; *Rouse v. Quinn*, 75 N. C., 354; *Walton v. Pearson*, 82 N. C., 464; *Holmes v. Holmes*, 84 N. C., 833; *Scroggs v. Alexander*, 88 N. C., 64. These rulings in all, except the first recited case, were made in answer to petitions for the writ of *certiorari* in place of an appeal, and are decisive of this. In the last case, referring to the Code-practice, ASHE, J. thus speaks: "It (the rule) is never relaxed in a case where the agreement for a deviation from the statutory mode of appeal is oral and is denied by either party, or the terms thereof are to be decided by

NICHOLS v. DUNNING.

conflicting affidavits. The only exception is when the waiver of the Code-rule can be shown by the affidavits of the appellee, rejecting those on the part of the appellant."

We do not mean to say that in all cases of an appeal, lost for non-observance of the strict requirements of the statute, the remedy of the writ will be denied, unless warranted by the statements of the adversary party, or by the evidence adduced by him; for in many cases it is issued upon a consideration of all the evidence, as shown by numerous adjudications. But the rule declared is enforced in applications based upon an alleged oral waiver of the statute, and that thereby the party has been misled into an omission to comply with its provisions, without which it would not have occurred. The very reason for the rule is to avoid the results of a misunderstanding on the part of opposing counsel and the circumstances thereby produced. Such, when they arise, must be left for correction to the counsel and their own sense of what is proper and due to each other.

There is no sufficient ground shown for the present application, and it must be denied, with costs.

Writ denied.

THOMAS L. NICHOLS and others v. R. J. DUNNING.

New Trial not ordered, when—Judge of Superior Court going out of office.

A new trial will not be granted where it appears that the papers constituting the record of a case in the court below were carried off by the judge and mislaid, and the judge has gone out of office. The appellant should first make an effort to have the papers returned to the court below, for until the filing of a transcript of the record here, the application for a new trial cannot be entertained.

NICHOLS v. DUNNING.

(This case does not fall within the provisions of section 550 of THE Code or the rule laid down in the cases cited).

(*Isler v. Haddock*, 72 N. C., 119; *Mason v. Osgood*, *Ib.* 120; *Simonton v. Simonton*, 80 N. C., 7; *Jones v. Holmes*, 83 N. C., 108; *Shelton v. Shelton*, 89 N. C., 185, cited and approved.)

MOTION for a new trial heard at October Term, 1884, of THE SUPREME COURT.

Messrs. Coke, Martin & Peebles, for plaintiffs.

Messrs. D. C. Winston and Hinsdale & Devereux, for defendant.

SMITH, C. J. Upon the rendition of judgment against the defendant at spring term, 1882, of Bertie superior court, he entered his appeal and prepared and served a copy of the case on appeal, in which the errors complained of are assigned, upon the plaintiff's counsel, who, not satisfied therewith, served a counter-statement on defendant's counsel.

These were delivered to the presiding judge to settle, who carried them, with all the other papers in the cause, away when he left the county, and none have ever been returned by him. He retired from office early in July following by resigning.

At the term of this court next thereafter the defendant applied for a writ of *certiorari* setting out the foregoing facts and it was awarded. Several other writs successively issued to the clerk of the superior court, to none of which, except the last, was any return made, and in this the response is that the papers were all carried away by the judge and have never been returned, and that they are lost or mislaid. In consequence of their absence he has been unable to copy and transmit the transcript of the record.

Upon this return, appellant's counsel move for a new trial, assuming that no case has been settled by the judge

NICHOLS v. DUNNING.

and none now can be, because he has ceased to hold office, and no relief is afforded by the recent statutory amendment which extends the authority of the judge, though out of office, within sixty days after the termination of a special term or after the courts of the district, in which the appeal was taken, have ended, to adjust the differences between counsel and settle the case on appeal. THE CODE, § 550.

The practice is settled in numerous decisions to grant a new trial, when, from no default of the appellant, no assignment of errors accompanies the record, and the omission cannot be supplied by reason of the retirement from office of the presiding judge upon whom the duty of adjusting the differences of counsel devolves. *Isler v. Haddock*, 72 N. C., 119; *Mason v. Osgood*, *Ib.* 120; *Simonton v. Simonton*, 80 N. C., 7; *Jones v. Holmes*, 83 N. C., 108; *Shelton v. Shelton*, 89 N. C., 185.

It thus appears that the papers are in the possession of the judge, unless lost or destroyed, and it may be that upon their restoration to the clerk's office, the case on appeal prepared by him may be found. At least some effort should be made to cause their return, so that the supposed omission to settle it may be seen, before annulling the whole proceeding by the award of a new trial.

But an insuperable obstacle to the present motion is in the fact that until the filing of the transcript of the record here, no cause is constituted in the appellate court, and no order affecting its merits can be made. The jurisdiction can be acquired only by the removal of the record in the court below by an appeal, or under the command of the writ of *certiorari* as a substituted method of bringing it up. Until this is done we cannot take cognizance of the cause and make any disposition of it. Our power is to cause the record to be sent up, and when there is none from which the transcript can be made, as is said in the clerk's return, it is obviously first required to have the original papers

 BRADFORD v. WILLIAMS.

necessary to this end restored to the office; or copies of such as are destroyed or lost supplied and substituted in place of the originals, under the direction of the court to which they belong. Until this is done, and the record then transmitted, no remedial action can be here had, such as is demanded by the petitioner. The motion for a new trial is denied.

Motion denied.

CLARA BRADFORD v. ROBERT WILLIAMS and others.

Negotiable Paper—Right of Endorsee who purchases in good faith.

Plaintiff delivered to an attorney for collection a bond endorsed in blank by the payee, and the attorney transferred it to the defendant who paid full value and without notice of such professional relation; *Held*, that plaintiff cannot recover upon the bond as against the defendant.

(*Parker v. Stallings*, Phil., 590; *Morris v. Grier*, 76 N. C., 410; *Moye v. Cogdell*, 69 N. C., 93, cited and approved.)

CIVIL ACTION tried at Special July Term, 1884, of PASQUOTANK Superior Court, before *Shepherd, J.*

The plaintiff on January 28th, 1878, placed in the hands of William Martin, an attorney, and the testator of the defendant, Elizabeth Martin, for collection a note under seal in the following form:

On or by the first day of January, 1877, I promise to pay Isaac W. Morrisett, or bearer, eleven hundred and sixty dollars, a part of purchase money for real estate whereon Isaac W. Morrisett resides.

Witness my hand and seal, this October 6th, 1874.

W. A. MOODY, [seal.]

Witness: Thos. Palmer.

BRADFORD v. WILLIAMS.

The note upon its back bore the name of the payee as endorser in blank when delivered to the attorney.

The plaintiff alleges, and this is the *gravamen* of her complaint, that the attorney transferred the note to the defendant Williams in payment of his individual indebtedness, and without receiving any other consideration, and that the latter collected the full amount of the balance due (there having been partial payments previously to the transfer) from the debtor, and appropriated it to his own use. The action is against both defendants to recover the sum so paid by the debtor, Moody.

The defendant, Williams, in a separate answer denies the plaintiff's ownership, averring that the note was the property of the attorney, and that, at the instance of the debtor and with his own funds, the attorney being under no liability to him, he paid the amount of the note and took possession of it as evidence of his demand against Moody. It is not material to refer to the answer of the executrix since she is not a party to the appeal.

Issues agreed upon were submitted to the jury which, with their findings, are these:

1. Was the plaintiff the owner of the note at the time of the assignment? Answer—Yes.

2. Has the attorney Martin ever accounted to the plaintiffs for the note? Answer—No.

3. Was Martin indebted to Williams and was the note transferred by the former to the latter in payment of such indebtedness? Answer—No.

4. Was the note paid and taken up by Williams at the request of Moody, and did he pay to the attorney its full value? Answer—Yes.

5. When was the note transferred by the attorney to Williams? Answer—On March 15th, 1879.

6. Did Williams have notice at the time of the transfer

BRADFORD v. WILLIAMS.

that the note was not the property of Martin? Answer—
No.

No exceptions were taken during the trial before the jury and, upon the rendition of the verdict, the plaintiff moved for judgment against both defendants for the sum paid to Williams by the debtor. The court gave judgment against the executrix, but refused the motion as to Williams and adjudged that he go without day. From the refusal and judgment for the latter, the plaintiff appeals.

Messrs. Grandy & Aydlett, for plaintiff.

No counsel for defendant.

SMITH, C. J., after stating the above. There is no error in the ruling and it must be sustained.

The delivery of the note, with the endorsement of the payee in blank—if indeed the same result does not follow without it, it being payable to the “bearer,” with no mark upon the instrument to indicate any interest or property in the plaintiff or other person—to Martin, although for the unexpressed purpose of collection was in law an assignment of the title thereto and conveyed a general authority to dispose of it as his own.

The act involves in substance a declaration to all who have no notice of the restricted agency or its trusts, that they may deal with him as rightful owner. This principle of commercial law governing the endorsement and transfer of negotiable instruments, is essential to the integrity and safety of commercial dealings, and too well understood and acted on to need citations in its support. It is illustrated in *Parker v. Stallings*, Phil., 590. In this case the defendant Stallings, to whom the note was executed, endorsed it to Jordan, his attorney, for collection under his advice that it was necessary to do so; but without stating any purpose in the endorsement, and it was again by Jordan sold and

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endorsed to the plaintiff Parker for full value and without notice of the terms of the previous endorsement to Jordan. It was decided that not only the title passed and a right of action vested in the plaintiff, but that the responsibilities of an endorser attached to the defendant and were transferred, from which he could not escape by showing, in the words of the opinion, "the fraud practiced by Jordan upon the other endorser." The rule seems to be, as thus declared, that the owner thus puts the note in the power of his endorsee to use and dispose of it, as his property, and is bound by his agent's acts and transactions, within the scope of his apparent authority, in his dealings with a *bona fide* assignee who pays full value therefor. It is a salutary rule for the maintenance of good faith and integrity in commercial transactions, which so often involve the transfer of negotiable papers.

But aside from this the jury find that the appellee took up the note with his own moneys and at the instance of the debtor, paying its full value and with no notice of an agency. This was clearly within the authority given to collect, and negatives the charge made in the complaint of a collusive transaction whereby the security was misapplied to the individual debt of the attorney.

The reference to adjudged cases in the argument for the appellant, Weeks on Attorneys, ch. 10, § 219, and notes at foot of page 381, will be found, on examination, generally to be cases of *known professional relations*, and most of them where suit has been brought; and there, it is held that a power to collect does not authorize an assignment or any disposition other than by full payment.

Of like import are the adjudications in this court in respect to the extent of an attorney's powers over a claim placed with him to collect or sue on. *Morris v. Grier*, 76 N. C., 410; *Moye v. Cogdell*, 69 N. C., 93.

One of the cases relied on in support of the appellant's

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contention and most favorable to his case, *Goodfellow v. Landis*, 36 Mo., 168, while sustaining the rule which protects the *bona fide* assignee of negotiable securities from an attorney, indicated upon the face of the paper as owner, subjoins the qualification that the transfer must be "limited to such persons as receive the instrument in the due course of business," a proposition which, if accepted as correct, embraces the case before us. There are no circumstances here which were calculated to awaken suspicion or raise an inquiry as to the trusts attaching to the possession of the attorney.

No cases we have examined impugn the proposition which protects an assignment made in good faith and for full value, and we concur in the ruling of the court which exonerates Williams from liability to the plaintiff. There is no error and the judgment must be affirmed.

Affirmed.

W. A. PRICE and others v. DAVID JACKSON.*Ejectment—Presumption of Grant—Adverse Possession.*

1. Where plaintiff in ejectment relies upon the presumption of a grant from the state arising from an adverse possession of thirty years, and introduces deeds which contain no metes and bounds or description by which the land can be located, and offers no evidence of known and visible boundaries; *Held* that he cannot recover.
2. Thirty years adverse possession, which was formerly held to be a presumption of a grant, is now by statute made an absolute bar against the state. But in such case the plaintiff must show a privity between himself and those who preceded him in the possession, and also, that the possession was held up to known and visible boundaries.

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(*Fitz Randolph v. Norman*, N. C. Term Rep., 127; *Candler v. Lunsford*, 4 Dev. & Bat., 407; *Edwards v. Jarvis*, 74 N. C., 315, cited and approved.)

EJECTMENT tried at Spring Term, 1883, of PERQUIMANS Superior Court, before *Shepherd, J.*

Judgment for defendant; appeal by plaintiffs.

Messrs. Grandy & Aydlett, for plaintiffs.

Messrs. Battle & Mordecai and *J. W. Albertson*, for defendant.

ASHE, J. The land in controversy was the western half of a tract called the "Will Morris land."

The plaintiffs in support of their title, relied upon the presumption of a grant from the state arising from a possession of thirty years, and offered in evidence the following deeds:

1. A deed from John Mitchell to Will Morris, dated Jan. 23, 1820, conveying a tract of land containing 118 acres.

2. A deed from J. W. Albertson, dated August 20, 1852, to R. F. Overman, conveying 12 acres of the Will Morris tract, being the one-tenth said land.

3. A deed from Ed. Morris to R. F. Overman, dated January 11, 1853, conveying the one-tenth interest in the Will Morris land.

4. A deed from R. F. Overman to Tim. Morgan, dated August 10, 1853, conveying four undivided shares, four-tenths of the Will Morris land.

5. A deed from Tim Morgan to Ed. Davis, dated September 30, 1856, conveying 50 acres of the Will Morris tract lying next to Little river, being the eastern part of the Will Morris tract.

6. A deed from Joseph S. Cannon to T. F. Banks, dated May 31, 1859, conveying 15 acres of the Will Morris tract adjoining David Jackson and others.

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7. A deed from T. F. Banks to Sanford Davis, dated January 16, 1860, conveying 15 acres of the Will Morris tract.

8. A deed from Ed. Davis to Sanford Davis, dated February 16, 1865, conveying all that part of the Will Morris land, which lies west of a division line that "they made between Ed. Davis and Sanford Davis, which is the land in controversy, and is all woodland except about three acres which is now being cultivated by the defendant Jackson."

9. A deed from Tim Morgan to Sanford Davis, dated October 1, 1865, conveying 47 acres of the Will Morris land.

10. A deed from Sanford Davis to William, John, and Joseph Palin, dated February 17, 1868, conveying the western half of the Will Morris land.

11. A deed from William, John, and Joseph Palin to J. M. Price, dated December 28, 1868, conveying the western half of the Will Morris land.

The plaintiffs are the heirs at law of J. M. Price who died on the day of 18...

The only evidence as to possession offered by the plaintiffs was, that R. F. Overman put a tenant on the land sometime in the year 1853, who lived in a house on the eastern half of the land, and cultivated a small field around the house, and all the land on the western half of the tract was then in woods. This tenant remained in possession until 1856, when Ed. Davis took possession and cultivated the field until the commencement of this action. There was never any other possession of the land, except what we take to be a recent possession of the defendant Jackson on the western half of it.

In the instruction which His Honor gave the jury, "that the plaintiffs had failed to show a title out of the state," there was no error. The instruction was right, whether the case is governed by section 18 of the Code of Civil Procedure, or by the law as it existed prior to the adoption of that Code.

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Before the Code of Civil Procedure, to prevent the uncertainty of titles, the courts of this state had adopted the arbitrary rule, that from the adverse possession of land for thirty years a grant from the state should be presumed—a rule so arbitrary that a jury was not permitted to find the fact against the presumption; nor was it necessary that the party in adverse possession should connect himself with those who had preceded him in the possession; nor was it necessary that the adverse possession should have been held up to *known and visible boundaries*, but only to the extent of the title claimed by the persons in possession, which might be shown by any of those ways which the law permits in the absence of metes and bounds set forth in deeds, or known and visible boundaries, as for instance, by the declarations of old men now dead, the deeds of neighboring tracts of land calling for the land in question by the name by which it was known, upon the principle, *id certum est quod certum reddi potest*. *Fitz Randolph v. Norman*, N. C. Term Rep., 127; *Candler v. Lunsford*, 4 Dev. & Bat., 407.

Here, none of the deeds read before the jury by the plaintiffs contained any metes and bounds, or any description of the land by which it could be located; nor was there any evidence adduced of any known or visible boundaries or other circumstance of identification sufficient to establish its location.

But the law is now changed, and the thirty years' adverse possession which was formerly held to be a presumption of a grant, is now by statute made, under certain circumstances, an absolute bar against the state.

It is provided by section 18 of the Code of Civil Procedure, "that the state will not sue any person for or in respect of any real property, or the issues or profits thereof, by reason of the right or title of the state to the same,"

1. "When the person in possession thereof, or those under whom he claims, shall have been in the adverse possession

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thereof for thirty years, such possession having been ascertained and identified under known and visible boundaries ; and such possession so held shall give a title in fee to the possessor."

The plaintiffs fall still further short of bringing their case within the purview of this statute, because they are here not only required to show a privity between themselves and those who have preceded them in the possession, but that the possession was held by them up to *known and visible boundaries*.

But there is another point in the case equally fatal to the plaintiffs' recovery, and upon which the case might have been disposed of without more showing. It is the failure of the plaintiffs to show an adverse possession of thirty years, which is necessary to oust the state, whether relied upon as a presumption or a statute of limitation. The adverse possession, here, by counting the entire time from the commencement of the possession by Overman's tenant in 1853, including that of Ed. Davis, up to the commencement of the action in March, 1882, was only twenty-eight years and some months ; but the time intervening from the 20th of May, 1861, to the 1st of January, 1870, is not to be computed, *Edwards v. Jarvis*, 74 N. C., 315, and after deducting that time, there was only an adverse possession of about nineteen years.

There is no error. The judgment of the superior court is affirmed.

Affirmed.

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R. J. LEWIS, Sheriff, v. JOHN F. DUGAR.

Drummers—License to sell must be in their actual possession to relieve from Penalty.

A drummer is not protected from the penalty denounced by statute against persons selling goods without license, unless he shall be in the *actual* possession of the license while doing business. Acts 1883, ch. 136, § 28. (In this case the license was mailed to defendant but not received by him at the time the sale was made).

CIVIL ACTION, tried at Spring Term, 1884, of HALIFAX Superior Court, before AVERY, J.

This action, in which the state was joined as plaintiff, was begun before a justice of the peace, to recover from the defendant the penalty of \$200, imposed by the statute, (ch. 136, § 28, of the acts of 1883) on "drummers," for selling goods by the wholesale without first having paid to the treasurer a tax of \$100, and obtained a license authorizing him to so sell, &c.

The section of the statute cited, among other things, requires that every person acting as a "drummer" in his own behalf, or for another person or firm, who shall sell, or attempt to sell, goods, wares or merchandise of any description by wholesale, with or without samples, before soliciting orders, or making any such sales, shall pay the treasurer of the state a tax of \$100 and obtain a license, which shall be effective for a year next after its date. It further provides, that if any person shall violate such provisions and requirements, he "shall be fined not exceeding fifty dollars, or imprisoned not exceeding thirty days, and shall forfeit and pay besides, two hundred dollars to the sheriff, to be collected by distress or otherwise, one-half of which shall be accounted for as other taxes, the other half to the use of the officer making the arrest; and it shall be the duty of

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all county and township bonded officers to prosecute for penalties under this section. The mayor, or any bonded officer of any town or city, shall have power to make arrests under this section, and collect the fine and penalty. The license issued under this section shall not be transferrable, but may be used by any agent in the service of the principal and not by *more than one person at one time, and shall be in the possession of the person while doing business under this section in this state to secure his protection.*

The treasurer of the state shall be authorized to issue a duplicate license in any case where the original is lost or destroyed upon an affidavit setting forth such fact.

It appears from the record that the plaintiff, Robert J. Lewis, was the sheriff of Halifax county on the 16th day of August, 1883, and so continued to be for several months next thereafter.

The defendant, during the whole of the said month of August, was a travelling salesman in this state for the business firm of A. Rosenstock & Co., of Petersburg, in the state of Virginia, wholesale dealers in dry goods and notions.

On the 14th day of August, 1883, the said firm wrote a letter to the treasurer of this state, applying for a license to sell goods under the statute above mentioned, and enclosing \$100 to pay the taxes required to entitle them to have such license, and requesting that the license be sent at once to the defendant at Enfield, in this state. The treasurer received the letter and the money on the 16th of August, 1883, and at once granted the license as applied for, and enclosed the same in a letter addressed to the defendant at Enfield, and the letter was deposited in the postoffice in Raleigh at 2 o'clock p. m. of the last mentioned day.

The firm notified the defendant at Enfield that the license would be sent to him there, and he expected to receive it the last mentioned day, and waited until the last post of that day arrived. Failing to receive the license, he offered

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for sale and sold for said firm in the afternoon of said last named day certain goods by wholesale. At 5 o'clock p. m. of last mentioned day the plaintiff, as sheriff of Halifax county, demanded of the defendant that he exhibit to him his license authorizing the sale of goods he had so made.

The defendant failed to exhibit any license at the time; indeed, he had none in his possession. Soon after that time, however, he received the license and exhibited it to the sheriff, before this action was brought to recover the penalty of \$200 imposed by the statute cited above.

Upon this state of facts, submitted to the court by consent of parties, the court was of opinion that the plaintiff was not entitled to recover, and gave judgment for the defendant, and the plaintiff appealed.

Messrs. Mullen & Moore, for plaintiff.

Mr. R. O. Burton, Jr., for defendant.

MERRIMON, J., after stating the above. At first we were strongly inclined to think that the principals of the defendant having paid the taxes required, and the license having been granted and mailed to the defendant at Enfield, before he sold the goods, he had not incurred the penalty prescribed. But upon more matured reflection, we are satisfied that such a construction of the statute would not effectuate the legislative intent.

The language of the statute is, that "any person *violating the provisions* of this paragraph," &c. Now, one of its provisions is, that "the license issued under this section shall not be transferrible, but may be used by one agent in the service of the principal, and not more than *one person at one time, and shall be in possession of the person while doing business under this section in this state to secure his protection.*"

This is a very material clause; it contains substantial and

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essential provisions. Among other things, it requires that the license "*shall be in the possession of the person while doing business.*"

This does not imply merely a constructive possession, but an actual possession of the license at the time of the sale, or offering to sell, the purpose being by having the license present to cut off, as far as practicable, the possibility that two or more agents might at the same time sell goods under the same license at different places and escape the penalty. But for this requirement that the party selling shall have actual possession of the license, it would be practicable for two or more agents to use the license for selling goods at the same time at different places. If the person or firm obtaining a license should have two or more agents, each *might* fraudulently employ it for "his protection." Thus, upon demand of the sheriff or other officer, to see the license, the agent then selling, or offering to sell, might say that he had a license; that he had by inadvertence or accident, left it at a distant point on a railroad; that he would get it by the next post and exhibit it as required; a second agent might sell, or offer to sell goods, and say and do likewise towards another officer; a third might do the same thing, and all three might sell, or offer to sell goods, and in a few hours after such sales, each might be able to show the sheriff or other officer the license for "his protection," granted to his employer. But for this requirement of the statute, in view of the railroad connections, it was possible to have so prostituted the license granted to the principal of the defendant as to "protect" one of his possible agents at Raleigh, one at Goldsboro, one at Wilson, one at Rocky Mount, and the defendant at Enfield, for selling goods for their principals in each of the towns named at the same time—each agent in the case supposed, could in the course of a few hours after selling goods, have shown the license to the sheriff or other officer demanding to see the same.

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It is not sufficient to say, that it is not probable this would be done; it *might* be done! Nor is it sufficient to say, that agents perpetrating such frauds would probably be detected sooner or later; they might be; in many instances no doubt they would not be. The legislature has deemed it necessary and wise to provide against such opportunities to commit fraud under the statute cited.

The plain purpose of the statute is to require the payment of the taxes imposed by it on persons selling goods by the wholesale with or without samples, and while it is no part of its purpose to restrain or delay the honest merchant from selling his goods, but on the contrary, it is its purpose to encourage and protect him, it undertakes to cut off as far as practicable, the possibility of fraudulent practices of such persons as seek to avoid paying the taxes due the state. It plainly intends that but one person at a time shall use a license; and to secure this, that person is required to have the license in his actual possession at the time he sells or offers to sell goods under it. So that, it is not sufficient to pay the tax and obtain a license to be shown when convenient, but is just as necessary that the person selling goods under the license, shall have it in his actual possession at the time he sells or offers to sell them. If he fails to do this, he incurs the penalty prescribed.

Looking at this case as presented by the record, we are impressed with the belief that the defendant and his principals acted in good faith, but this does not excuse or relieve him from the penalty. He had no right to sell goods as he did without having the license in his actual possession; this was as necessary for "his protection," as the license itself. He ought to have delayed selling the goods until he got actual possession of the license.

The statute does not exempt persons from the penalty who make honest mistakes in cases like this, or make any provision for their relief; it requires all to be circumspect, and

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comply with all its requirements, not simply a part of them.

It is said that the statute is a severe and exacting one; with that we have nothing to do; it is our province to expound and apply it in the cases that come before us. We do not doubt that we have properly given effect to the legislative will.

There is error for which the judgment of the superior court of Halifax county must be reversed, and judgment entered here for the plaintiff.

Error.

Reversed.

ASA COLEY v. R. J. LEWIS.

Marriage License—Penalty against Register of Deeds for issuing same without compliance with the statute.

1. A register of deeds is not permitted to issue a marriage license, where one of the parties is under eighteen years of age, until the consent in writing of the person under whose charge he or she is, *shall be delivered* to the register. The written consent is a condition precedent to its issue.
2. Therefore where the register delivered a license complete in form to one with instructions not to give it to the parties until the mother's consent in writing was given (which was necessary here), and it was never presented to the mother or her consent obtained, but the marriage ceremony was performed under it; *Held* that the register is liable to the penalty of \$200 prescribed by section 1814 of THE CODE.

CIVIL ACTION tried on appeal at Spring Term, 1884, of HALIFAX Superior Court, before *Avery, J.*

Judgment for defendant; appeal by plaintiff.

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Mr. R. O. Burton, Jr., for plaintiff.

Messrs. Mullen & Moore, for defendant.

SMITH, C. J. The plaintiff's action is to enforce the penalty of two hundred dollars, alleged to have been incurred under the act of February 12, 1872, constituting chapter 42 of THE CODE, and entitled "Marriage and Marriage Settlements and the Contracts of Married Women."

The material facts presented in the "case agreed" and submitted to the judge in the superior court for his determination of the law arising thereon, are these:

On December 14, 1881, one Lewis Edwards applied to the defendant, who was then register of deeds for the county of Halifax, for a license for the marriage of Alick Powell, his brother-in-law, and Bettie Vine, stating at the time that the latter, then residing with her mother, was under the age of seventeen years. The defendant at first declined to give the license without the written permission of the mother. But upon the representations of Edwards as to the condition of the roads and bad weather, the defendant wrote out and signed the license, at the same time preparing the certificate to be signed by the mother and giving her consent to the proposed marriage, both of which were delivered to Edwards with instructions not to deliver the license until the accompanying certificate had been signed.

Upon his return home, Edwards placed the license in his unlocked trunk, whence it was abstracted by Powell and under it the marriage ceremony performed. The certificate was never presented to the mother for her signature, and her written consent was not given.

Section 1814 of THE CODE is in these words: Every register of deeds shall, upon application, issue a license for the marriage of any two persons, *provided* it shall appear to him probable that there is no legal impediment to such marriage; *provided further*, that where either party to the pro-

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posed marriage shall be under eighteen years of age and shall reside with the father or mother, or uncle or aunt, or brother or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, the register shall not issue a license for such marriage, *until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom such infant was placed at school, and under whose custody and control he or she is, shall be delivered to him, and such written consent shall be filed and preserved by the register.*

The next section prescribes the forms of the license and certificate of marriage, when solemnized by the person performing the service, substantially to be observed.

Section 1816 declares that every register of deeds who shall knowingly or without reasonable inquiry issue a license for the marriage of any two persons, to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by section 1814 (in the original act "section five of this act," corresponding thereto), shall forfeit and pay two hundred dollars to any person who shall sue for the same.

The inquiry is—has the defendant by his acts in the premises exposed himself to the action for the prescribed penalty? and the answer depends upon the construction of the act.

The contention for the defendant is that the conditional delivery of the license to Edwards, with directions to withhold it until the written consent of the mother was secured by her signing the certificate, is not an "issue" of it within a fair interpretation of the section, and its surreptitious seizure and removal from the trunk, though followed by consummation of the marriage, does not render the delivery criminal. We do not acquiesce in this view. While it is true that upon repeated adjudications under the statute of limitations, it is held that issue of process in an action which

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arrests its running, is referrible to its delivery to the officer who is to execute it, and perhaps to the time of delivery to the plaintiff suing it out when he intervenes, the word is appropriate to designate the time when the instrument, complete in form, passes out of the register's hands by his own act into the hands of another; and this, unaffected by directions as to terms for its subsequent use.

It is defined by WORCESTER in the first paragraph, as "the act of passing out; exit; egress or passage out;" and by WEBSTER, "the act of sending or causing to go forth; a moving out of any enclosed place; egress."

In this sense the statute prohibits the register from permitting the completed license to pass from the office and beyond his control into the hands of any applicant acting for a party to the proposed marriage. It requires, as a condition *precedent to the issue*, the consent of the designated relative or person in writing, and this written consent must be "filed and preserved" in the office.

Moreover, if the prescribed form of license was pursued, (as we must assume, in the absence of any suggested variance, it was), it recites the fact—"the written consent of Becky Coley, the mother, to the proposed marriage having been filed with me"—and this could not be unless, before its preparation, such consent was given in a written and signed instrument in possession of the register. The penalty is incurred in the very act of delivery under the circumstances, and no escape is afforded by the directions given at the time as to its delivery by the applicant.

The statute cannot mean a delivery of the license to the minister or justice of the peace, as essential to the criminality of the official act, and in that particular similar to the delivery of a judicial mandate to an officer; for if so, a delivery to one of the parties to the proposed marriage would not be a violation of the act. To give it this enlarged scope, would be to defeat its object in preventing the

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clandestine marriages of infants under the prescribed age, without the approval of parents or friends, when they may be supposed hardly capable of estimating the consequences of so important a step in life, and forming a matured judgment as to its propriety. The statute would be of little value, if capable of evasion by so simple a contrivance as this case presents.

It prescribes a safe and salutary rule to prevent hasty and improvident unions on the part of persons of such tender age, in not only requiring the previous consent of such as have an interest in their well-being and happiness in future life, but that the consent shall be in writing, unmistakable in terms, delivered to the register and retained by him before he is permitted to issue, that is, to give a complete form of license under his hand to another, whereby the marriage may be brought about.

While penal statutes must, in case of doubt, be strictly construed in their operation against others, a primary rule is to ascertain from the words used the intent of the enactment, and give such reasonable meaning as will prevent the mischief intended to be remedied, and secure the ends the statute was intended to subserve.

There is error in the ruling and the judgment must be reversed, and judgment entered for the plaintiff on the case agreed.

Error.

Reversed.

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RIDLEY BROWN v. L. B. EATON.

Holograph Will—Valuable Papers.

1. A script, written in a book containing accounts against the decedent's tenants, was found eight months after his death, in a bureau drawer or valise, both of which contained valuable papers, and proved by three credible witnesses to be in the decedent's handwriting, and the book was frequently seen by a witness before decedent's death and again on the day after his burial; *Held* upon trial of an issue *devisavit vel non* that the jury were warranted in finding the script to be the will of the testator.
2. Where one has two or more depositories of his valuable papers, the finding his will in either will suffice.
(*Little v. Lockman*, 4 Jones, 494; *Adams v. Clark*, 8 Jones, 56; *Winstead v. Bowman*, 68 N. C., 170, cited, and approved.)

CIVIL ACTION *devisavit vel non* tried at Fall Term, 1884, of WARREN Superior Court, before *Gudger, J.*

It was proved by six witnesses that the paper writing in controversy was in the handwriting of the decedent, J. Falcon Brown.

W. B. Falcon, a witness for the propounder, testified that the book in which the paper writing was contained was kept by his uncle (the deceased) in his house, and had in it his accounts with his tenants. He had seen it frequently before his uncle's death, which occurred May 8, 1883, and he saw the book again the day subsequent to his burial, when Brown the propounder requested the witness to go with him to examine the papers of the deceased. Papers were found in a bureau drawer, and also in a leather valise or trunk, but the witness did not know whether the book was in the bureau drawer or in the valise. They were placed together on the floor and their contents examined, and an inventory taken at the time. There were valuable papers in both places; in the valise, the witness remembered

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the following were found: a note on G. B. Alston for about \$2,200, which was good; \$50 in United States currency; and other papers, receipts, &c., of less value; and in the bureau drawer, were found \$50 in gold and \$12 in silver; a mortgage on Nat. Nicholson for about \$1,000 or \$1,500, which was good; and some other papers. Both the valise and drawer were locked.

After taking the inventory, the book was put into the drawer which was locked, and the propounder Brown took the key. The witness next saw the book during the Christmas holidays thereafter, when it was brought to his house by Brown and his son, and then for the first time he saw the paper writing and recognized it as the handwriting of his uncle.

The paper writing was in pencil in a book sewed together in paste-board covers.

Ridley Brown, the propounder, testified that the book containing the paper writing was found in a drawer or valise, both of which were locked, and the papers examined as testified to by the witness Falcon. The valise contained old deeds to parts of his land; some good and some worthless notes; one note on G. B. Alston for about \$2,200, good, and \$50 in greenbacks, and the witness was inclined to the opinion that the book was in the valise. In the drawer, were some deeds and receipts; a mortgage against Nat. Nicholson for about \$1,000 or \$1,500; fifty dollars in gold and some silver, and some correspondence. He did not examine the book at that time, but put it in the drawer and locked it and kept the key. He put it in the drawer with papers which he did not think it necessary to take away, but carried with him to his house (two miles distant) all papers out of which he thought any money could be made, and left the book there for convenience of settlement with the tenants. He next saw the book in November when looking for a tenant's account, but did not then see the paper

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writing; and in December he next saw the book. He sent his son to examine a tenant's account and gave him the key to the bureau drawer for that purpose, and on that day saw the paper writing which was shown him by his son. The key to the room, in which was the bureau, was kept by a Miss Shearin who lived in the house and was an illiterate woman.

There were accounts for the current year in the book containing the paper writing, many of which were collected according to the book.

Falcon Brown, son of the propounder, testified that he went for the book about the 27th of December. He got the key to the drawer from his father, and examined the book for one Stanberry's account, and found the paper writing on that occasion and carried it to his father and they then went together to Falcon's carrying the book with them.

Upon this evidence it was agreed that if the paper writing was properly found as required by the statute, then the jury should render a verdict for the plaintiff propounder; and if not, then for the caveators.

His Honor, being of opinion with the propounder, so charged the jury and the issue was found accordingly. Judgment; appeal by defendant.

Messrs. W. A. Montgomery and Battle & Mordecai, for plaintiff.

No counsel for defendant.

ASHE, J. The only question presented by the record for the determination of this court, is—Was there such a finding of the paper writing as is required by the statute?

The statute provides that "no last will or testament shall be good or sufficient in law or equity to convey or give any estate, real or personal, unless such last will shall have been

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written in the testator's lifetime, and signed by him or some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, no one of whom shall be interested in the devise or bequest of the said estate; or unless such last will and testament be found among the valuable papers and effects of any deceased person, or shall have been lodged in the hands of any person for safe keeping, and the same shall be in the handwriting of such deceased person, with his name subscribed thereto, or inserted in some part of said will; and if such handwriting shall be proved by three credible witnesses who verily believe such will and every part thereof is in the handwriting of the person whose will it appears to be, then such will shall be sufficient to give and convey real and personal estate." Rev. Code, ch. 119, § 1; THE CODE, § 2136.

It is not disputed that the paper writing offered for probate was in the handwriting of J. Falcon Brown, and that his handwriting was proved by three credible witnesses; but it is contended that it was not found among his valuable papers and effects, according to the requirements of the statute, so as to constitute it the last will and testament of the said Brown.

The counsel for the caveators relied upon the cases of *Little v. Lockman*, 4 Jones, 494, and *Adams v. Clark*, 8 Jones, 56. We do not controvert the decision in those cases. They were correctly decided upon the facts presented. In the first case, the script propounded was found in the drawer of a bureau among some *worthless papers and rubbish*, and there were valuable papers and effects kept in another drawer of the same bureau; the script was not found among the valuable papers and effects. And in the latter case, which the learned counsel contends is analagous to the one before us, the script was seen eight months before the death of the decedent, when he was seen to put it in a pocket book, in which he usually carried bank bills, and not seen again

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until shortly before the trial of the issue, and *it was held* that that was no evidence it was found *at or after* the death of the decedent.

But the facts of our case are altogether different. Here, the will was written in a book with paste-board covers in which accounts against tenants of the decedent were kept by him for the purpose of settlement with them. The book was frequently seen by one of the witnesses before decedent's death, and again on the day subsequent to his burial. The book was kept either in a bureau drawer or in a valise, but in the one or the other, both of which were kept locked. And notwithstanding the will was not discovered until eight months after the death of J. Falcon Brown, there is a moral certainty that the will was in either the drawer or valise at the time of his death, and the jury were well warranted in so finding.

The only other inquiry then to make it the will of the decedent, is—Was it found among his valuable papers and effects?

There were valuable papers in both the drawer and valise. In the drawer, were some deeds, a mortgage against Nat. Nicholson for about \$1,000 or \$1,500, some receipts, fifty dollars in gold and some silver. In the valise, were old deeds to parts of his land, some notes, one on G. B. Alston for about \$2,200, fifty dollars in greenbacks, and one of the witnesses expressed the belief that the book was in the valise; and the book itself containing accounts against his tenants was a valuable paper, and title-deeds, notes and money are certainly valuable effects.

So that, no matter whether the script was found in the drawer or valise, it was found among his valuable papers and effects, and having been proved by three credible witnesses to be in the handwriting of J. Falcon Brown, it comes up fully to the requirements of the statute.

Where a person has two or more depositories of his val-

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uable papers and effects, the *finding* in either will suffice. It is not necessary it should be found in that which contains the most valuable papers and effects. *Winstead v. Bowman*, 68 N. C., 170.

There is no error. Let this be certified to the superior court of Warren county that further proceedings may be had according to law.

No error.

Affirmed.

M. WEINBERG v. ALBEMARLE & RALEIGH RAILROAD
COMPANY.

*Railroads—Common Carriers—Negligence—Bill of Lading,
stipulations in.*

The rule announced in *Phifer v. Railroad*, 89 N. C., 311, that a stipulation in a bill of lading, given by one of an associated through-line of common carriers to transport goods beyond its own line, to the effect that if damage to the same be sustained by the shipper, that company alone in whose custody the goods were at the time of the loss shall be answerable, is affirmed.

(*Phifer v. Railroad*, 89 N. C., 311; *Phillips v. Railroad*, 78 N. C., 294, cited and approved.)

CIVIL ACTION tried on appeal from a justice's judgment, at Fall Term, 1883, of EDGECOMBE Superior Court, before *Shepherd, J.*

Upon the facts stated in the opinion here, and no evidence of defendant's negligence having been introduced, the court below held with the defendant, and gave judgment accordingly, from which the plaintiff appealed.

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Mr. John L. Bridgers, Jr., for plaintiff.

No counsel for defendant.

MERRIMON, J. The plaintiff delivered to the defendant company a box of merchandise, to be transported over its railroad from Tarboro to Williamston, in this state, and thence by steamer to Baltimore, Md., and took from the defendant a bill of lading that contained this provision: "It is further stipulated and agreed, that in case of any loss, detriment or damage to, or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company shall alone be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment or damage, and in such case, that company shall have the benefit of any insurance effected by or on account of the owner or shipper of said goods."

The goods were of the value of \$78, were duly transported by defendant and delivered to the steamboat company at Williamston, and they were destroyed by fire while in the actual custody and care of the latter company. There is no allegation that the defendant was in default in any respect, except as it might be liable on account of the supposed negligence of the steamboat company. The railroad line and the steamboat line were distinct but connecting lines of transportation between Tarboro and Baltimore, and each in the course of business delivered freights to the other for transportation.

This being the case, we are of opinion that the plaintiff cannot hold the defendant liable for the loss sustained by him.

The bill of lading was evidence of a contract between the plaintiff and defendant, and the former is bound by all the stipulations therein that were lawful and did not contravene

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public policy in respect to common carriers. The court held in *Phifer v. Railroad*, 89 N. C., 311, that a stipulation precisely like that recited above was reasonable, and did not contravene any rule of law or public policy, and was binding upon the shipper of goods or party to it. The Chief Justice delivered an elaborate opinion in that case, correctly expounding the law, and we see no reason to modify it in any respect. It is directly in point here, and this case must be governed by it.

The plaintiff's counsel relied in the argument upon the case of *Phillips v. Railroad*, 78 N. C., 294. That case might be applicable and in point, but for the stipulation in the bill of lading above set forth. If there had been no such stipulation, then the defendant might have been liable in case of negligence.

The view we have taken renders it unnecessary to advert to any other ground of error assigned in the record.

 H. J. GREENLEAF v. NORFOLK SOUTHERN RAILROAD
COMPANY.

*New Promise—Statute of Limitations—Contract of Corporation—
Verdict—Interest—Practice.*

1. A new promise must be unconditional and in writing, signed by the party, and to pay the amount of the original debt, in order to remove the bar of the statute and revive the contract. THE CODE, § 172. The exception to the judge's charge in this case cannot be sustained.
2. A contract made by an officer of a corporation and ratified by the corporation, becomes the contract of the latter.

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3. A verdict allowing "interest to date" in a case where the proof is that the principal sum was due in April, 1876, is sufficiently definite as to the time for which the computation is to be made.
 4. Suggestions of counsel as to what occurred on the trial will not be regarded. This court is confined to the consideration of the record.
- (*Ward v. Herrin*, 4 Jones, 23; *Long v. Gantley*, 4 Dev. & Bat., 313; *Brumble v. Brown*, 71 N. C., 513; *Whissenhunt v. Jones*, 80 N. C., 348, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1884, of PASQUOTANK Superior Court, before *Gudger, J.*

This action was instituted on the 1st day of June, 1880, to recover the sum of \$952.14 claimed to be due the plaintiff from the defendant, upon a liquidated account dated April 18, 1876. It was originally brought against the Elizabeth City and Norfolk railroad company (now the Norfolk Southern). The facts are stated in the opinion here. Judgment for plaintiff; appeal by defendant.

Messrs. Grandy & Aydlett, for plaintiff.

Messrs. Starke & Martin, for defendant.

SMITH, C. J. This action is prosecuted by the plaintiff assignee of William A. Greenleaf, to recover the balance of an alleged indebtedness due for services rendered as secretary of the defendant company under its former name and organization in the sum of nine hundred and fifty-two dollars and fourteen cents, with interest thereon accrued since April 18th, 1876.

The answer controverts any liability in the premises, and, if any exists, sets up as a defense thereto the lapse of time as a bar to the action. Several issues were submitted to the jury and passed on, of which it is only necessary to consider two as bearing upon the subject matter of the defendant's appeal.

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1. Is the defendant company indebted to the plaintiff, and, if so, in what sum? The jury answer: Yes, about nine hundred and fifty-two dollars and fourteen cents, with interest to date.

4. Is the plaintiff's claim barred by the statute of limitations? The jury answer: It is not.

Upon the trial the defendant's counsel requested the court to give these instructions to the jury:

1. In order to remove the bar of the statute of limitations the new promise must be in writing, and must be unconditional, and if the jury believe from the evidence that the new promise alleged by the plaintiff to have been made by the defendant was not in writing, or was to pay a less amount than the original debt, or in some modified form, then the plaintiff is not entitled to recover.

The court gave the charge, adding: But if the promise was in writing and to pay the full amount, it removes the bar of the statute. To this the defendant excepted.

2. It is not within the ordinary scope of the power and authority of a secretary of a railroad corporation to make contracts binding such corporation, and unless from the evidence the jury believe that the secretary of the defendant company was expressly authorized by a regular vote of the board of directors of the company to make the written contract, which plaintiff alleges to have been made, the defendant is not bound by the contract, and the plaintiff cannot recover in this action.

The instruction was given with the omission of the concluding words, "and the plaintiff cannot recover in this action," in place of which were substituted the following: "But if such contract, if made by the secretary, was afterwards ratified by the company, it is a contract binding upon it." The defendant again excepts.

The first exception cannot be sustained unless the substituted sentence so changes the meaning of the instruction

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as to make it erroneous in law. This is not the effect, for it leaves in full force every substantial element in the charge given in the very form asked, and is but the counterpart of the proposition. The instruction is that the promise, to be operative, must be in writing—unconditional, and not to pay a sum less than the original debt. These conditions must unite in order to remove the statutory bar. The subjoined qualification is, that, if it be in writing and to pay the whole debt, it must revive the contract and displace the obstruction in the way of recovery. Taken in its entirety, the charge leaves in full force what had been before said, that the promise must be in writing, extend to the whole debt, and not be in “a modified form,” by which last expression is meant that the promise must be to pay in money, and not in something else of value, or in other words the reviving promise must be commensurate with the original promise.

The argument for the appellant was pressed with much earnestness that an important feature in the “promise or acknowledgment” required by the statute to give it effect is omitted, in that, it must be “*signed* by the party to be charged,” and that this is error. C. C. P. § 51.

The charge, as requested and as given, evidently assumes the presence of the necessary signature and the formal execution, otherwise it would not be the defendant’s contract, and is directed to a description of the essential substance of the contract and its efficiency when properly entered into. No distinction between a contract, signed by the debtor himself and one executed on his behalf by an authorized agent, is adverted to or assignment of error found in the record for this omission, and surely the appellant cannot complain that the instruction, prepared by its counsel and given in very words by the court, is erroneous for such now alleged defect. How can we take notice of the kind of signature in the absence of any statement in the record, and

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no objection to the contract is made based upon the supposed fact? Our appellate jurisdiction is limited to errors assigned in the rulings of the court below, and in the charge of the judge, for only such are understood to be intended for revision and the statements of the record directed to their elucidation.

Our only inquiry is as to the correctness of the direction upon the features of the contract to which the attention of the judge is called, not to others wholly outside, and in this the ruling is not obnoxious to objection.

2. The exception to the second charge as modified is equally untenable.

It obviously refers to the original contract and declares how an agreement entered into by an officer of the company, such as is described, without previous authority, may become the agreement of the company. No fault can be imputed to this statement of the law. It may, by subsequent adoption or ratification, become as effectual and binding as if the person acting in its behalf had been invested with power to bind the principal; and the more especially does this principle apply to an officer of the company engaged in the discharge of his duties, upon the maxim, *ratihabitio retro trahitur et mandato æquiparatur*.

The court is not defining the promise which in law is necessary to revive a pre-existing liability, lost or incapable of being enforced in consequence of delay, but such promise as will in the first instance impose an obligation upon a principal party, and the instruction to this effect requested. Had it been refused, it would then become necessary to send up in the transcript all the evidence heard bearing upon the issues, in order to our reviewing the ruling and passing upon its correctness. If there were none such as would warrant the finding, the jury ought to have been so directed and there would be error in the refusal to so charge. As it is not seen from the record that any such request was

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preferred, the appellant cannot be heard here to complain that the jury were not instructed in this particular. The practice in this court has been uniform not to entertain such an exception here taken for the first time, and to consider the case as stated to present only the exceptions made in the court below.

We cannot know how much evidence was offered not contained in the statement on appeal. *Ward v. Herrin*, 4 Jones, 23; *Long v. Gantley*, 4 Dev. & Bat., 313; *Brumble v. Brown*, 71 N. C., 513; *Whissenhunt v. Jones*, 80 N. C., 348, and numerous other cases.

Of the three grounds assigned in support of the motion to set aside the verdict and grant a new trial, the first two, to-wit: for misdirection and because the verdict is "contrary to law and evidence" have already been disposed of and need no further comment. The last only remains to be considered, and that is, that interest is adjudged from a period not fixed in the verdict and therefore not authorized by the indefinite finding of "interest to date."

It was in proof that the principal sum demanded, if recoverable, was due in April, 1876, and the court charged that interest was to be allowed, if the plaintiff was entitled to recover his debt, from that date. The verdict must be understood in connection with the charge, and when it allows "interest to date" it must be taken to intend it, in conformity with the instruction, and thus the time for which the computation is to be made is rendered definite and certain. Nor was any complaint made as to this direction until after the rendition of the verdict.

That interest was recoverable is manifest from the very words of the statute, nor is the contrary asserted in the argument here.

We cannot listen to suggestions as to what transpired in the court when the trial took place, nor the manner in which the case on appeal has been prepared. We are confined to

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the examination of the record sent up, and can only pass upon errors therein appearing, assuming that it is made out only to present such for an appellate revision. This is a necessary rule, and, as cases are to be made out by the appellant, and the intervention of the judge only required when exceptions are taken by the appellee, and then to pass upon and adjust the differences, leaving untouched such as are concurred in by both parties, it is obvious, when the practice is observed, there can be little cause of complaint, or if so it does not admit of correction here. The judge who tries the cause is better prepared to decide upon disputed matters, occurring under his own observation, and to him the law confides the power and imposes the duty of settling them.

There is no error and the judgment must be affirmed.

No error.

Affirmed.

WILMINGTON & WELDON RAILROAD COMPANY v. W. H. KITCHIN and others.

Negotiable Instruments—Alteration of Bond does not vitiate, when—Agency.

1. Where a bond was placed in the hands of a co-obligor for delivery, without condition or instructions, and he subsequently erased the name of one of the signers before delivering it to the obligee and without his knowledge or consent; *Held* that the bond is not vitiated.
2. In such the co-obligor acts as the trusted agent of his associate obligors, and his abuse of the trust in altering the bond does not relieve them from liability upon the same.

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3. Where one of two persons must suffer loss by the fraud of a third person, he who first reposes the confidence must bear the loss.

(*Vass v. Riddick*, 89 N. C., 6; *Barnes v. Lewis*, 73 N. C., 138; *Gwyn v. Patterson*, 72 N. C., 189, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1883, of EDGECOMBE Superior Court, before *Shepherd, J.*

The action was brought to recover the balance due on a bond of twenty-five thousand dollars, which the defendants, forty-eight in number, had executed to one John Barry and assigned by him to the plaintiff.

In or about the month of July, 1881, the said Barry entered into a contract with Kitchin and others to construct the road-bed of a branch railroad from the town of Scotland Neck, in Halifax county, to a point on the plaintiff's road, about a mile and a half south of the town of Halifax. Among other things, he stipulated to furnish all the cross-ties and lay the same, and do all the necessary work to complete the road-bed, for the consideration of twenty-five thousand dollars, to be paid him when the road was completed. To secure to him the said sum, the defendants, including C. P. Simmons, A. A. White, James A. White, J. L. Whitehead, B. J. Allsbrook and B. D. Gray, executed the bond which is the subject of the action, to said Barry, in which they jointly and severally obligate themselves to pay him the said sum when the road-bed was completed and accepted by the engineer in charge. It was so accepted.

All the defendants, except C. P. Simmons and the others above named, resisted the recovery of the plaintiff upon the ground that there had been a material alteration in the bond, which rendered it void. They alleged in their answer that defendant Kitchin, one of the signers of the bond, brought it to them and requested them to sign it, and at that time it had been signed by some, and among them was the name of Alfred White, a man of wealth and a prominent citizen of Scotland Neck; and they seeing his name,

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with those of others, agreed to sign the bond, and did sign it by the request of Kitchin; and after their signatures were obtained, and before the bond was delivered by Kitchin to the obligee named therein, the name and signature of Alfred White was erased at his request by the said Kitchin, and the bond was altered without the knowledge or consent of these defendants, and they were not notified of the alteration until after the delivery of the bond by Kitchin to the obligee.

The following issues were thereupon submitted to the jury, who responded as indicated:

1. Was the name of Alfred White, one of the obligors, erased after the signatures of the bond by the defendants without the knowledge or consent of the defendants? Answer—Yes.

2. Did the obligee named in the bond know or consent to the erasure of Alfred White's name? He did not.

3. Was Alfred White, at the time of his signature of the bond, a man of wealth, and did he sign the same before the defendants? Yes.

4. Was the name of Alfred White on the bond an inducement to the defendants to sign it? Yes.

5. Did the defendants sign the bond solely because White's name was on it? No.

It was admitted by the parties that the alteration was made before delivery.

Thereupon it was adjudged by the court that the plaintiff is not entitled to recover, and that defendants recover their costs. From this judgment the plaintiff appealed.

Messrs. J. L. Bridgers, Jr., and Haywood & Haywood for plaintiff.

No counsel for defendants.

ASHE, J. The only question presented for our consider-

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ation by the record, is—Did the erasure of the name of Alfred White by Kitchin, before the bond was delivered, vitiate the bond?

The instrument is upon its face the joint and several bond of all who signed it. After signing and sealing, it was put in the hands of W. H. Kitchin to be delivered to the obligee. While in the possession of Kitchin the name of Alfred White, one of the original signers, whose signature preceded those of the defendants who contest its execution, was erased by him and then delivered to the obligee without their knowledge or consent.

Kitchin was a co-obligor of the defendants, and, by leaving the bond in his hands to be delivered, was constituted their agent for that purpose.

The act of erasure was either a fraud committed by him upon his co-obligors, or was an abuse of the authority reposed in him as their agent.

If it was a fraud practiced by him upon his co-obligors without the knowledge of the obligee, the defendants are not permitted to set up such a defence to relieve themselves from liability.

It has been recently decided by this court, that one who signs a note or bond cannot avoid his liability by showing that he was induced to execute the same by the fraud of his co-obligor, in which the obligee had no participation. *Vass v. Riddick*, 89 N. C., 6. There, the action was brought on a promissory note payable to W. W. Vass and purporting to be signed by Leroy Bagley and W. H. Bagley. The proof was that Leroy Bagley carried the note to N. J. Riddick and asked him to sign it as security, which he did, believing that the signature of W. H. Bagley was genuine; but it turned out that the name of W. H. Bagley was forged, yet the court held that Riddick was liable and was not excused by the fraud of his co-maker, Leroy Bagley.

In *Anderson v. Warren*, 71 Ill., 20, where it was sought by

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one of the makers of a promissory note to avoid the payment on the ground the note was obtained by the fraud and circumvention of a co-maker, which was not participated in by the payee, *it was held* that his right could not be affected by any fraud practiced between the makers of the note. The same principle was announced in the case *Bigelow v. Cormiggs*, 5 Ohio, 256.

But conceding there was no fraud, and none is charged, the question then arises—Was there such an abuse of authority given by the defendants to Kitchin, their agent, as to avoid the bond as to them?

It is a general rule laid down by many authorities, that where there is an agreement between the parties to an obligation that it shall not be valid unless executed by all of certain persons, it is not valid unless so executed; but this rule is subject to exceptions, as for instance, where the obligee had no notice of the condition or reservation, and it is absolutely delivered. *State v. Peck*, 53 Maine, 284.

In this case, there was no condition or agreement between the obligors, and no instruction given to the agent in regard to the delivery, but the bond was placed in his hands for delivery as their deed, without any reservation. The principal is bound by the act of his agent, if he clothes him with powers calculated to induce third persons to believe that the agent had authority to act in the given case. The bond was joint and several, and when delivered by Kitchin, it was the delivery of each obligor, as much so as if each obligor had delivered it in person as his separate bond. "*Qui facit per alium, facit per se.*" The defendants trusted in his good faith, and if he abused the trust, its abuse did not furnish them with any good cause of complaint against the obligee, who, as was found by the jury, did not know of or consent to the erasure of White's name. To adopt the language of Chancellor KENT, who lays down the rule with more precision: "Whoever deals with an agent con-

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stituted for a special purpose, deals at his peril when the agent passes the precise limits of his power; though if he pursues the power exhibited to the public, his principal is bound even if private instructions had still limited the special power." The rule here stated is substantially announced and maintained in the case of *Millett v. Parker*, 2 Metc. (Ky.), 608, where it is held "that one who signs a covenant as surety upon the condition and agreement between him and his principal that it is not to be binding upon him, or delivered to the covenantee, unless another person should also sign it, is bound thereby, although the principal, to whom he entrusted it, delivered it to the covenantee without a compliance with such a condition." To the same effect are *Barnes v. Lewis*, 73 N. C., 138; *Gwyn v. Paterson*, 72 N. C., 189; *Smith v. Moberly*, 10 B. Mon., 246; *Scott v. Whipple*, 5 Greenl., 336; 1 Shep. Touch., 71.

The principle decided in these cases disposes of any conclusion of law adverse to the plaintiff, to be drawn from the fact found by the jury in reference to the fourth issue; so that it was an immaterial inquiry whether the name of Alfred White on the bond was an inducement to the defendants to sign the same.

But there is another principle involved and decided, directly applicable to the case before us: that where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss. This doctrine is recognized in *Barnes v. Lewis*, *Vass v. Riddick*, *State v. Peck*, *supra*, and in *Herndon v. Nichols*, 1 Salk., 289.

Barry was an innocent holder. Kitchin was the agent of the defendants. The delivery of the bond was confided by them to him. The obligee had reason to believe that Kitchin had authority to deliver the bond in the state ex-

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isting at the time of delivery. The defendants reposed the confidence and must sustain the loss, if any.

There is error. The judgment of the superior court is reversed and a *venire de novo* awarded. Let this be certified.

Error.

Venire de novo.

T. D. MARTIN and others v. J. M. WORTH, State Treasurer.

Parties—Claim against the State—Jurisdiction.

The state (not the public treasurer) is the proper party defendant in an action, wherein the plaintiff demands the return of bonds alleged to have been exchanged for other bonds in 1862, and the jurisdiction to hear such claim, it being one against the state, is exclusively lodged in the supreme court.

(*Rand v. The State*, 65 N. C., 194, cited and approved).

CIVIL ACTION, tried at June Special Term, 1883, of WAKE Superior Court, before *Philips, J.*

The facts are stated in the opinion of this court. The Attorney-General filed a demurrer to the plaintiff's complaint, which, upon the hearing of the case in the court below, was overruled, and the defendant appealed.

Messrs. J. W. Hinsdale and John Devereux, Jr., for plaintiff.
Attorney-General, for the defendant.

SMITH, C. J. The facts contained in the complaint and admitted in the demurrer upon which our interpretation is demanded are these :

In the month of April, 1862, Fred. Fisher, Daniel M. Barringer, of whom two of the plaintiffs are successors, and

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William S. Mason, the other plaintiff, as trustees under the will of one Josiah Ogden Watson, and in execution of the trusts therein declared, held five several bonds of the state, each in the sum of five thousand dollars, which had matured in January preceding.

At the time first mentioned, the said trustees delivered three of the bonds to the treasurer then in office and acting, and received from him a certificate or acknowledgment entitling them to other bonds of like amount instead.

In October of the same year the certificate was returned and the three several state bonds provided for, issued in place of the first, were delivered to the trustees, bearing interest at the higher rate of eight per cent. per annum, and bearing date on March 1st previous, numbered respectively, 91, 206, 207. These surrendered bonds remain in the treasurer's office in custody of the defendant, the present incumbent.

The exchange was made, as a renewal of the public indebtedness, for the reason that there were no good funds which could be used in payment at the time, and for no other consideration, nor was the transaction meant in any way to aid the state in its then pending struggle with the federal government to separate it from the Union.

The plaintiffs demand of the defendant the restoration of these original state bonds, in order to their being funded under the provisions of the act of March 4th, 1879, (ch. 98) extended by the act of January 16th, 1883, (ch. 6) if they are still in the treasury and can be produced, and, if not, that the treasurer be required to issue to them, such as are authorized by the said acts in case the said surrendered bonds had always remained in their hands, and no such exchange made.

Upon the hearing the court overruled the demurrer with permission to the defendant to answer the complaint, and

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from this judgment the appeal is taken to this court. The correctness of this ruling is the question before us.

The defendant is but the custodian of the surrendered bonds, having had no personal part in the transaction by which they passed into the possession of his predecessor, and the substantial object aimed at in the suit is to have a judgment declaring the validity of the surrendered public securities as if no exchange had been made, and to establish the state indebtedness under them as still subsisting, and the return of the evidences thereof. The state has a direct interest in this issue, since, if redelivered, the state may be deprived of the right to cancel them, and thus extinguish the obligations of the covenants.

The judgment demanded is that these returned securities, notwithstanding the voluntary acceptance of others, substituted in their place, subsist in unimpaired force and impose a liability still upon the state.

That this is an assertion of a claim against the state, and an effort to enforce it as such, in an action to which the state is not and cannot be made a party in the jurisdiction invoked, is too manifest to require argument in its support. The proceeding finds no sanction in the rulings in *Osborne v. Bank of the United States*, 9 Wheat., 738, and other cases recognizing the principle there laid down; and "original jurisdiction to hear claims against the state" is under the constitution confided exclusively to the supreme court. Const., Art. IV, § 9.

The state is an essential party to the controversy which involves its continuous responsibility upon the bonds, and should have an opportunity to contest the obligation.

An action very similar, differing merely in the fact that the bonds were taken up with an issue of state treasury notes instead of the issue of other bonds, was before this court in the exercise of the original jurisdiction conferred by the constitution, in *Rand v. State*, 65 N. C., 194, thus

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recognizing the proper tribunal to entertain and pass upon the claim.

There is no cause of action shown against the defendant, and in refusing the plaintiffs' demand he is but discharging an official duty in the safe keeping and preservation of these papers of the state.

There was error in the judgment overruling the demurrer and it must be reversed, the demurrer sustained and the action dismissed.

Error.

Reversed.

ANDREW SYME, Adm'r, v. J. N. BUNTING and others.

*Official Bond of Clerk, liability of before and since The Code—
Receiver.*

The sureties on a clerk's official bond, executed before THE CODE went into effect, are not liable for a default of their principal in the management of a fund which came into his hands as receiver where the order of appointment does not name him as clerk. But such bond, under THE CODE, §§ 72, 1585, protects interests confided to clerks when appointed receivers.

(*Wilmington v. Nutt*, 80 N. C., 265; *Kerr v. Brandon*, 84 N. C., 128; *Rogers v. Odom*, 86 N. C., 432, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1884, of WAKE Superior Court, before *Gudger, J.*

This action was brought in the name of the state on relation of the plaintiff administrator, upon the official bond of the defendant, executed when he was clerk of the superior court. The case was heard upon exceptions to a referee's report, and from the ruling and judgment of the

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court below the plaintiff appealed. The facts appear in the opinion here.

Messrs. Strong & Smedes and Pace & Holding, for plaintiff.

Messrs. John Devereux, Jr. and J. W. Hinsdale, for defendants.

SMITH, C. J. In an action pending in the superior court of Wake, at fall term, 1869, prosecuted by the solicitor against H. A. Hodge, guardian to one Woodson Carpenter, (a lunatic and the present relator's intestate) for an account and settlement of the trust estate under the statute, an interlocutory judgment was entered in these terms:

"This cause, coming on to be heard upon the complaint of the plaintiff, it is ordered and adjudged that George H. Snow be appointed to take an account of said guardianship:

"That John N. Bunting be appointed receiver to take possession and manage said estate, subject to the orders of this court."

By virtue of the appointment the said receiver, then clerk of the court, by renting and otherwise, came into possession of a fund of several hundred dollars belonging to said lunatic, to recover which the present action is constituted against said Bunting and the other defendants, sureties to his official bond, given to secure the faithful discharge of his duties as clerk, no bond having been required to secure the estate passing into his hands as receiver under said appointment.

Under an order of reference a report was made showing to be in the hands of said Bunting the sum of \$383.39 not accounted for, and for which he was liable to the relator. The referee also finds as matter of law, that the official bond of Bunting as clerk, to enforce which the suit is brought, does not cover his liabilities incurred under the appointment as receiver, and that the sureties thereon are not re-

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sponsible for the default, so that while the relator is entitled to judgment against Bunting personally, he cannot recover against his said sureties. The relator excepted to the referee's conclusion of law in regard to the obligation of the sureties, which being overruled and judgment rendered in favor of the sureties, the relator appeals.

The only question presented for solution is, whether the lunatic's estate is protected and secured by the official bond of the clerk, upon whom, without naming him as such in the order of appointment, the office was devolved, and whether his sureties undertake for this default.

The statute in force when the bond sued on was given, and with whose provisions, as stated in the complaint, we assume that it conforms, directs the condition to be that "he shall account for and pay over according to law all moneys and effects which have come or may come into his hands *by virtue or color of his office*, and shall diligently preserve and take care of all books, records, papers and property which have come, or may come into his possession *by virtue or color of his office*, and shall in all things faithfully perform the duties of *his office as they now are or thereafter shall be prescribed by law*."

The words used in the concluding clause we have interpreted in *Wilmington v. Nutt*, 80 N. C., 265, as contemplating the future annexation of such other duties as are germane and appropriate to the office itself, inclusive of such as lie along the shadowy line which marks the distinction between those that are, and those that are not of that character.

The terms of the condition measure the obligation assumed in respect to moneys and effects *officially received*, as being limited to such as pass into the clerk's hands "*by virtue or color of his office*," and as a security for these only. The form of the bond as prescribed in THE CODE, § 72, much enlarges the scope of the obligation, by adding to the words quoted, "or under an order or decree of a judge, even

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though such order or decree be void for want of jurisdiction or other irregularities;" but this provision is prospective, applying to bonds thereafter entered into, and does not effect the responsibilities of the bond now in suit.

In *Kerr v. Brandon*, 84 N. C., 128, in a similar proceeding the clerk of the court, without being designated in his official capacity, was appointed receiver, and the estate of infants committed to his management, and it was held that the appointment was *personal* and the clerk's bond was not chargeable with his defalcation or waste; and this, mainly for the reason that the duties devolving upon a receiver differ too widely from those resting upon the clerk and involve such wide responsibilities as not to be deemed to have been in contemplation of the provision of the bond that takes in newly imposed clerical duties. The opinion proceeds upon the ground that the clerk is not mentioned in the statute, but the appointment is to be "of some discreet person," while in the cases in which official liability is incurred, the officer is specially mentioned in the acts to whom the duties required may be assigned, and who acts in his official character, named or not named in their performance.

In the later case of *Rogers v. Odom*, 86 N. C., 432, while numerous authorities are referred to distinguishing between the functions exercised by these respective judicial agencies, and it is held that the clerk's bond was not responsible for funds, not under the control of the court when committed to the custody of the clerk, (appointed a receiver and so named in the order), in the opinion it is intimated that it might be otherwise if the fund was then under the control of the court.

It may be observed that while such a burden, as might sometimes be imposed upon the clerk, as in case of a dissolved corporation with large resources, and others not now uncommon, might, if the estate is wasted or impaired by

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negligence, absorb the penalty of the bond and leave suitors and others unsecured and injured by these officers' misconduct or loss, the difficulty would be wholly obviated by requiring a bond from the receiver in amount adequate to afford compensation for persons injured by misconduct in the receiver, while the clerk's bond would be unimpaired and remain a full security against loss from his default.

It can scarcely be presumed that the sureties to such a bond executed it with an understanding that interests, sometimes so complicated and vast, might be committed to the officer for the faithful management of which they were to become liable, where the condition is confined to moneys and effects or papers passing into his hands, "by virtue or color of his office," and the proper duties of the office are so many and so varied.

The general assembly, however, have seen fit to remove this source of controversy by adding to the words we have quoted, "or under an order or decree of a judge even though such order or decree be void for want of jurisdiction or other irregularities," (section 72,) and by prefixing to the words "some discreet person," the words "clerk of the superior court, or." (Section 1585.)

These changes seem to indicate the legislative intent to expand the scope of the clerk's bond so as to take in and protect the interests confided to his keeping under the appointment of a receiver, and such will be the extent of the obligation entered into by the clerk and his sureties in a bond executed since THE CODE went into operation. Of the wisdom of dispensing with a separate bond from a receiver and adding his to the responsibilities of the clerk, we have nothing to do; but as the law existing and in force when the present bond was given does not have such effect, in submission to the rule already adjudged we must hold the sureties, defendants, exonerated from responsibility for the

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default of the clerk. There is no error and the ruling must be affirmed. It is so adjudged.

No error.

Affirmed.

R. W. WHARTON, Adm'r, v. W. A. GATTIS and others.

Reference—Costs—Discretionary Power.

1. Where a reference was made upon demand of one of several defendants in his answer, the admission of the allegations in the complaint by another of the defendants will not relieve the latter from paying his proportionate part of the costs of the reference.
2. The court intimate that the mode of apportionment of costs among persons all liable, is a matter of discretion in the judge below.

(*Wall v. Corington*, 76 N. C., 150, cited and approved.)

CIVIL ACTION, tried upon exceptions to a referees's report, at Fall Term, 1884, of WAKE Superior Court, before *Gudger, J.*

The demand in the answer of one of the defendants was for a reference, &c., and the order for the same was made on motion of the plaintiff's counsel. The defendants appealed from the judgment rendered in the court below.

No counsel for plaintiff.

Messrs. Gatling & Whitaker and *Armistead Jones*, for defendants.

SMITH, C. J. The defendant Bledsoe being indebted to the plaintiff's intestate, David M. Carter, in a large sum, evidenced by notes under seal, with his wife, executed a deed of mortgage to the intestate, conveying the various

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tracts of land mentioned and described in the complaint for the security and payment of said notes. Subsequently the said Bledsoe sold a part of said lands to his co-defendants, W. A. Gattis, J. A. Jones and D. J. Ellis, (associated in business under the partnership name of Gattis, Jones & Ellis) taking their notes for the unpaid purchase money, and a reconveyance by deed of mortgage of the same part of said land to said Bledsoe for their security.

The notes of Gattis, Jones & Ellis were afterwards assigned by said Bledsoe to the intestate as a further collateral security for his own indebtedness.

Numerous payments have been made upon said indebtedness, which are set out in the complaint and admitted in the answer of Gattis, Jones & Ellis, while the answer of Bledsoe and wife insists upon a larger amount of credits than those enumerated in the complaint which ought to be applied to his indebtedness, and also asserts that more is due upon the collateral securities which should go in further reduction. He (Bledsoe) then demands an inquiry, and, as a means of ascertaining what is due from the said Gattis, Jones & Ellis, and from himself to the intestate's estate, that a reference be ordered.

The referee has reported the sums due upon these separate classes of securities, after, it would seem, much and complicated labor and computation in adjusting the numerous payments to the many notes due, and ascertaining the relations and liabilities of the defendants, as measured by the computation allowed without objection as to its amount.

The reference was made at the instance of the plaintiffs, and the costs thereof were properly adjudged against the defendants, and the appeal is from so much thereof as apportioned this sum in equal parts between the defendant Bledsoe and the defendants Gattis, Jones & Ellis, the latter insisting that they should be taxed with no part of the

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amount, inasmuch as they admit the allegations of the complaint, and, as to them, no inquiry by reference was necessary.

It is quite obvious that the services of the referee were advantageous to all the defendants, if indeed not indispensable to a proper understanding and adjudication of the case; and we see no reason why the results in the particular mentioned should control in the disposal of this item of costs. The plaintiff incurred them as necessary in arriving at the resultant indebtedness of all the defendants to the intestate's estate, and this burden should be borne by them as much as the other costs. *Wall v. Covington*, 76 N. C., 150. If the mode of apportionment was open to review by appeal, and not a matter of discretion in the judge, as we are disposed to think the apportionment among persons all liable is, in the absence of any express legislative declaration on the subject, we should not feel at liberty to revise and modify the order made, as in our opinion it is just and proper.

There is no error, and this will be certified to the superior court of Wake.

No error.

Affirmed.

* W. W. VASS and others v. PEOPLES' BUILDING & LOAN ASSOCIATION and others.

Pleading, when new party is brought in—Waiver—Judgment, irregular, may be set aside.

1. Where a complaint was filed against the defendant, and in the progress of the action another party defendant is brought in, the

* SMITH, C. J., did not sit on the hearing of this case.

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complaint must be amended or another complaint filed as to him, unless he waive his right to the same by answering the original complaint.

2. A judgment by default for want of an answer, where no complaint is filed against such new party, is irregular and may be set aside at any time.

(*Keaton v. Banks*, 10 Ired., 381; *Dick v. McLaurin*, 63 N. C., 185; *Cowles v. Hayes*, 69 N. C., 410; *Leach v. Railroad*, 65 N. C., 486; *Vick v. Pope*, 81 N. C., 22, cited and approved.)

APPEAL from an order, setting aside a judgment, granted at Fall Term, 1884, of WAKE Superior Court, by *Gudger, J.*

The summons in this case was made returnable to fall term of 1877 of the superior court of Wake county. At that term the plaintiffs filed the complaint, but the defendants, first made parties defendant, did not file any answer at that term or afterwards.

At spring term, 1878, the plaintiffs moved for leave to make additional parties defendant, naming them severally, and among them are the parties who moved to set aside the judgment presently to be mentioned. The court granted the motion, and ordered "that the summons and complaint be amended accordingly, and that the clerk issue summons to said parties." Accordingly, a summons was issued and executed and the additional parties therein named were commanded to appear in court "on the 4th Monday in June, 1878, and answer the complaint which will be deposited in the office of the clerk of the superior court of said county within the time prescribed by law, and let the said defendants take notice, that if they fail to answer the said complaint within the time prescribed by law, the plaintiffs will apply to the court for the relief demanded in the complaint."

The plaintiffs failed to amend the complaint filed, or to file any amended or additional complaint.

Afterwards, at February term, 1880, the court gave "judg-

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ment by default" in favor of the plaintiffs, "according to their complaint against the defendants, holders of cancelled shares," &c.

It does not appear that any further action was taken until August term, 1881. At that term the parties named in the order of the court set forth below, moved to set aside said judgment by default as to themselves, on the ground that the plaintiffs had filed no complaint as to them, and they were not called upon or bound in law to answer the complaint originally filed at the appearance term. The motion thus made was continued from term to term until the August term, 1884. At that term the court made this order: "Theo. H. Hill, S. W. Whiting, Wm. G. Upchurch, Bennett Smedes, C. S. Allen, J. C. Blake and V. Ballard, having moved to set aside the judgment in the above entitled action as to them, the motion is allowed, and the said judgment is set aside as having been irregularly granted, and the defendants are allowed till the following term of the court to answer any complaint the plaintiffs may file against them." From this judgment the plaintiffs appealed.

Messrs. Haywood & Haywood and Gatling & Whitaker, for plaintiffs.

Messrs. Fuller & Snow and E. C. Smith, for defendants.

MERRIMON, J., after stating the case. It will be observed that the motion to set aside the judgment in this case, was not based upon alleged "mistake, inadvertence, surprise or excusable neglect," on the part of the appellees, but upon the ground of its alleged *irregularity*.

An irregular judgment may be set aside at any time within a reasonable period, this depending on the circumstances of the case, and the party complaining is not bound to move in such respect within a year next after it has been entered, as in case of "mistake, inadvertence," &c.

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An irregular judgment is one given contrary to the method of procedure and the practice under it, allowed by law. As, if judgment should be given against an infant, no guardian having been appointed or appearing to represent him and take care of his interests in that behalf; or, where the court gave judgment without the intervention of a jury in a case where the party complaining was entitled to a jury trial and did not waive his right thereto; or, where a judgment was prematurely entered by default; or, where it was the duty of the plaintiff to give notice of the taxing of costs, and failed to give such notice, and took judgment. In such and like cases, the judgment is irregular, and upon proper application of the party injured the court would set it aside for such irregularity. *Keaton v. Banks*, 10 Ired., 381; *Dick v. McLaurin*, 63 N. C., 185; *Cowles v. Hayes*, 69 N. C., 410; *Freeman on Judgments*, § 97.

Then, is the judgment in question irregular in a material respect? We think it is; and that is so because it was without any proper pleading on the part of the plaintiffs that put the appellees to any defence they might be able and see fit to make.

Regularly, a civil action must be commenced by a summons, and the defendant is summoned to appear at the next ensuing term of the court after its issue, and "answer the complaint of the plaintiff," and he is notified in the summons, "that if the defendant shall fail to answer the complaint within the time specified, the plaintiff will apply to the court for the relief demanded" in the complaint. THE CODE, §§ 200, 213. The plaintiff must file his complaint in the clerk's office on or before the third day of the term to which the summons is made returnable, the defendant having been summoned; and at the same term, the complaint being filed, the defendant must appear and demur to, or answer it, and the plaintiff must at that term join issue upon the demurrer, or reply to the answer, as the case may

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require, and the issues raised by the pleadings must stand for trial at the next term thereafter. THE CODE, §§ 206, 207, 208. This, of course, is subject to the power of the court to enlarge the time for pleading and make all proper orders in respect thereto.

These provisions of THE CODE plainly contemplate that in the orderly course of procedure, the plaintiff shall, upon bringing the defendant into court, plead, that is, file a complaint setting forth in apt terms his cause of action against the defendant, so that the latter may know what it is, and consider whether he will admit the same, or in any proper way make defence thereto. The plaintiff must plead at the appearance term, or else, at that or a subsequent term, in the absence of a complaint, the defendant may move for judgment of *non pros*.

Ordinarily the complaint filed applies and has reference only to the party or parties before the court at the time of filing it. They are required to plead at the appearance term, or judgment final for want of a proper pleading, may in some cases be taken against them, and in others an interlocutory judgment may be taken.

The plaintiff may obtain leave in a proper case, to make additional parties defendant. If such parties are made after the complaint shall be filed, the plaintiff must obtain leave to amend his complaint, filed in such way as to make it apply to and require new parties to demur to or answer it, when they come into court; or when they appear an amended complaint must be filed, setting forth the plaintiff's cause of action as to them, or requiring them, by proper averments, to answer the complaint already filed. The plaintiff must proceed against the new parties by a proper pleading before he can move for judgment by default, final or interlocutory, against them; and if he fails to plead as to such new parties at the term at which they appear, they may at that, or a subsequent term, in the absence of an

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amendment of the complaint filed, or an amended complaint, or an order of the court requiring them to answer the complaint filed, move for judgment of *non pros.* as to themselves. While new parties may be made at almost any time in the progress of the action, they must be made in such apt way as to properly charge them by the pleadings, particularly where relief is demanded against them. This is necessary, to the end that the new party to the action may learn with reasonable certainty the cause of action against him, and have opportunity to make defence.

The views we have thus expressed are warranted by a just construction of the provisions of THE CODE in respect to the pleadings in actions, and as well by principles of common justice. Every party to an action should be able to see and learn from the record his relation to it, either by some appropriate pleading or some pertinent order of the court.

In this action the plaintiff at first sued certain defendants, who were duly served with a summons. At the appearance term he filed his complaint, alleging his cause of action against the defendants then before the court; at that term he obtained leave to make additional parties defendant; a summons was issued as to them; they were summoned to appear and "answer the complaint, which will be deposited in the office of the clerk," &c., and were notified in the summons "that if they failed to answer the said complaint within the time prescribed by law the plaintiffs will apply to the court for the relief demanded in the complaint." They did appear, but the plaintiff did not amend the complaint filed so as to embrace them and let them plead, if they saw fit to do so; nor did he file an amendment, or indeed any complaint as to them. As he did not, they might have moved for judgment of *non pros.* as to themselves, but they failed to do so, and the plaintiff moved for and obtained judgment by default against them as if they had been served with a complaint, or an amended complaint,

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or had been required by a proper order of the court to accept the complaint as applicable to them.

It was said on the argument that they were in court, and so they were, but the plaintiff had not pleaded as to them, nor was there anything in the pleadings in any way alleged against them as parties defendant. They had been notified that a complaint would be filed, and had the right to expect one would be. Besides, the order of the court allowing the new parties to be made, required that the "summons and complaint be amended accordingly," that is, so as to embrace and charge the new parties with the complaint filed.

According to the course, the practice, and the express order of the court, the appellees had the right to expect and require a proper pleading on the part of the plaintiffs, so that they might make defence, if they saw fit. They were not bound to take action until this should be done. And as the judgment by default was taken in the absence of a necessary and orderly pleading on the part of the plaintiffs, it is irregular.

While the orderly and regular course of procedure and practice is such as we have indicated, a party may, and oftentimes does waive his right to have something done in the course of the action by the appearing party. When he can and does waive such right, he will be concluded as certainly as if the course of action had been in all respects regular. As if, in this case, the appellees had answered the complaint filed, without any amendment to it, or any amended complaint; or, if they had done some act showing their purpose to waive a further pleading on the part of the plaintiffs, or to make defence, in such case they would have been concluded. But such *waiver* must appear. There is nothing in the record before us that indicates such waiver. It does not appear that anything was done in the action after the appearance of the appellees, except the taking of

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the judgment, until they moved to set it aside for irregularity. They submitted to no action on the part of the plaintiffs, and did no act themselves that could be reasonably construed to be a waiver of their right to plead. Under the circumstances of the case we think the court properly set the judgment aside.

On the argument, the appellants' counsel relied upon the cases of *Leach v. Railroad*, 65 N. C., 486; and *Vick v. Pope*, 81 N. C., 22. These cases decide that a judgment is not void because no complaint was filed, the defendant being before the court; and they and other similar cases rest on the ground that the defendant may *wave* the complaint and confess judgment, or consent to it, but this does not imply that the regularity of procedure and pleading may be dispensed with where a party in apt time insists upon the same. It is a false notion entertained by some of the legal profession, that the Code-system of procedure is without order or certainty, and that any pleading, however loose and irregular, may be upheld; on the contrary, while it is not perfect, it has both logical order, precision and certainty when it is properly observed. Bad practice, too often tolerated and encouraged by the courts, brings about confusion and unjust complaints against it.

The record presents no question as to the character of the cause of action, and although this was hinted at in the argument for the appellees, we are not called upon to express any opinion in that respect.

The judgment must be affirmed. Let this opinion be certified according to law.

No error.

Affirmed.

CLEMENTS v. ROGERS.

A. K. CLEMENTS v. M. A. ROGERS, Ex'r, and others.

*Executors and Administrators—Payment of Legacies—Waiver
by answer to merits.*

1. Where in a suit for a legacy it is made to appear either by the complaint or the admissions in the answer that there is no necessity for retaining the fund by the executor (such as outstanding debts, assets not collected, &c.), the court may, within the two years after the qualification of the executor, adjudge the payment of legacies. THE CODE, § 1512.
2. The objection of the defendant, that the action was brought with the two years, and that there was no allegation in the complaint why the court should adjudge a payment before the lapse of the two years, is waived by his filing an answer to the merits and consenting to have the case put upon the calendar for trial. The order dismissing the action is erroneous.
(*Tucker v. Baker*, 86 N. C., 1; *Hobbs v. Craige*, 1 Ired., 332; *Turnage v. Turnage*, 7 Ired. Eq., 127, cited and approved.)

CIVIL ACTION, tried at March Special Term, 1884, of WAKE Superior Court, before *Avery, J.*

This action was brought to recover of the defendant as executrix of Mary A. Rogers, deceased, a legacy bequeathed to the plaintiff by the will of the testatrix. The case is sufficiently stated in the opinion.

The plaintiff appealed from the judgment dismissing the action.

Messrs. A. M. Lewis & Son and Strong & Smedes, for plaintiff.
Messrs. D. G. Fowle and E. C. Smith, for defendant.

ASHE, J. The defendant, when the cause was called for trial by jury, according to the calendar previously set by the court, moved to dismiss the action, because it appeared that the action was brought within two years from the qualifica-

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tion of the defendant executrix, and there was no allegation in the complaint under section 1512 of THE CODE of North Carolina why the court should adjudge a payment of said legacy before the lapse of two years from said qualification as executrix.

The court held that some reason should have appeared, such as that there was no indebtedness of the estate of the said Mary A. Rogers, or that for some reason stated in the complaint a full or partial settlement of the estate could be made by the executrix, and offered to allow the plaintiff to amend his complaint upon the payment of all the costs that had accrued in the action, but the plaintiff declined to amend upon the terms offered, and therefore the court adjudged that the action be dismissed.

However it may be upon a proper construction of section 1512, as to whether a reason should be assigned in the complaint why the action was commenced within two years after the qualification of the executrix, we are of the opinion that objection has been waived by the defendant in the present action. The defendant filed an answer to the complaint upon the merits, consented to put the case upon the calendar for trial, and after the case has been pending for two years in court, takes the plaintiff by surprise with a motion to dismiss.

Under section 239 of THE CODE, the defendant may demur to the complaint on the ground that the court has no jurisdiction of the person of the defendant, or of the subject of the action, and, "that the complaint does not state facts sufficient to constitute a cause of action." All other objections except these are waived unless they be taken by demurrer or answer, (§ 242) and these objections may be taken by demurrer at any time, even in this court. *Tucker v. Baker*, 86 N. C., 1.

But the complaint here does set forth a cause of action, and the only objection to it that can be urged is that the

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action was prematurely commenced, which is a matter of defence, which should have been set up by the defendant in the answer, as, that the assets have not been collected; that there are large outstanding debts against the estate; and that it is involved in litigation, so that it would be impossible to know how much of the assets would be applicable to the payment of legacies. These are matters of which the legatees or next of kin cannot be presumed to know, but they are matters peculiarly within the knowledge of the executor or administrator.

The section (1512) relied upon by the defendant in support of his motion is only a legislative affirmance of the law as it existed before THE CODE. It reads: "It shall be in the power of the judge or court, on petition or action, within two years from the qualification of an executor, administrator or collector, to adjudge the payment in full or partially, of legacies and distributive shares, on such terms as the court shall deem proper, *when there shall be no necessity for retaining the fund.*" This is substantially what Judge GASTON said upon this subject in *Hobbs v. Craige*, 1 Ired., 332. He there said: "The act of assembly (Revised Code, ch. 46, § 18,) making it obligatory on executors to settle the estate at the end of two years after their administration shall have begun, does not authorize them to defer the settlement until that time without necessity. And it is competent to those interested to file their bill or present their petition for such a settlement, as soon as they think proper, the proceedings upon such bill or petition being under the control of the court." And in *Turnage v. Turnage*, 7 Ired. Eq., 127, where the decision is of the same import, the court say that the allowance of *two years* by the statute to executors and administrators to settle estates, was intended as an indulgence to them and was by no means intended to confer on the residuary legatee the right to have the fund put out at interest for his benefit. The statute thus construed

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by Judge GASTON is substantially the same as section 1488 of THE CODE. Each provides that: "No executor or administrator shall hold or retain in his hands more of the deceased's estate than amounts to his necessary charges and disbursements, and such debts as he shall legally pay, but all such estate so remaining shall, immediately after the expiration of two years, be divided, delivered and paid to such person as the same may be due by law or the will of the deceased."

Under the provisions of section 1512, the proceedings are as much under the control of the court, as under the former statute; for it provides that the court may within the two years adjudge the payment of the legacies and distributive shares in *full* or *partially* upon such terms as it shall deem proper, *when there shall be no necessity for retaining the fund.*

The court is empowered to adjudge the payment of the legacies, &c., whenever it is made to appear that there is no necessity for retaining the fund; and it can make no difference whether that information is derived from the complaint or the admission in the answer.

In this case it is clearly shown by the complaint and admissions in the answer that there was no necessity for retaining the fund.

It is alleged in the complaint that the estate of the defendant's testatrix was solvent, and that there were large amounts in her hands due to the plaintiff. And the defendant admits the solvency and that there was the sum of about \$3,500 in her hands belonging to the testatrix, and she does not allege that there are debts or charges upon the estate to be paid. It is thus clearly made to appear to the court that there was no necessity for retaining the fund.

Our conclusion, therefore, is that there is error. Let this be certified to the superior court of Wake county that further proceedings may be had.

Error.

Reversed.

WHITE v. HOLLY.

CHARLES WHITE v. THOMAS D. HOLLY and others.

Contract to convey land must be registered—Evidence.

Contracts to convey land are not available in law and cannot be admitted in evidence in an action for specific performance, until proved and registered. THE CODE, § 1245.

(*Edwards v. Thompson*, 71 N. C., 177.; *Mauney v. Crowell*, 84 N. C., 314, cited.)

CIVIL ACTION tried at January Special Term, 1884, of BERTIE Superior Court, before *Avery, J.*

The defendants appealed from the judgment of the court below.

Messrs. Mullen & Moore for plaintiff. .

No counsel for defendants.

MERRIMON, J. The plaintiff brought this action to compel specific performance of a contract in writing whereby the defendant, Holly, agreed to convey to the plaintiff the land mentioned in the complaint. To prove the contract as alleged, the plaintiff put in evidence two receipts of different dates for certain cotton, the agreed price of which was, by the terms of the receipts, "to go, as part payment, on the price of land he (the plaintiff) lives on," signed by the defendant Holly.

The defendants objected to the admission of these receipts as such evidence, assigning as ground for their objection, that they had not been proved and registered according to law. The court overruled the objection, the receipts were received as evidence, and the defendants excepted.

Whatever may have been the state of the law in respect to the admission of such contract without registration before THE CODE went into effect, it is very clear, that all *contracts*

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for the conveyance of land must be proved and registered before they can be used as evidence in actions like the present one. They are now put on the same footing with deeds for real estate, as evidence, and cannot be admitted as such, until proved and registered.

THE CODE, § 1264, requires that "all contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases required to be put in writing, upon due proof or acknowledgment thereof in the manner in this chapter provided for the conveyances of lands, shall be registered in the proper county within two years from the date of such contracts or leases."

If this were the only statutory provision in respect to such contracts, perhaps they might be put in evidence without registration. Indeed, it has been said that like contracts might be. *Edwards v. Thompson*, 71 N. C., 177; *Mauney v. Crowell*, 84 N. C., 314. But THE CODE, § 1245, provides that "no conveyance of land, nor contract to convey, nor lease of land for more than three years, shall be good and available in law, unless the same shall be acknowledged by the grantor or proved on oath by one or more witnesses in the manner hereinafter directed, and registered in the county where the land shall lie within two years after the date of the said deed; and all deeds so executed and registered shall be valid, and pass estates in land without livery of seizin, attornment or other ceremony whatever."

It will be observed, that this section changes and enlarges section 1 of chapter 37, Revised Code, so as to embrace *contracts to convey* lands, as well as conveyances for the same. The first section above set forth requires all such contracts to be proved and registered; the second provides that they shall not "*be good and available in law*," until and unless they shall be so proved and registered, that is, like an unregistered deed, they shall not be received in evidence, or actively serve the purpose for which they are created, until

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proved and registered. Registration does not give them life, but efficiency ; it fits and renders them competent to be evidence of themselves, and to be enforced by the courts, if otherwise sufficient to serve the purpose contemplated by them.

The receipts put in evidence by the plaintiff were the only written evidence of the contract, for the conveyance of land, he seeks to enforce. He insists that they sufficiently specify a contract in writing to entitle him to the relief he prays for. If so, they make up the *contract*, however brief in terms, and however inartificially expressed, that the statute requires to be proved and registered in order to render it "good and available in law." The receipts must be proved and registered before the court can receive them as evidence and act upon them for the purposes of this action.

There is error, for which a new trial must be awarded. Let this opinion be certified to the superior court of Bertie county to the end, that that court may proceed in the action according to law. It is so ordered.

Error.

Venire de novo.

NORTH CAROLINA STATE LIFE INSURANCE COMPANY v.
ORREN WILLIAMS.

Contract—Insurance—Agency—Power coupled with an interest.

1. A contract between a life insurance company and its agent stipulated that the agent should receive as compensation 25 per cent. commissions on first year payments, and 5 per cent. on renewals. The company went out of business and assigned the policies

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(secured through the efforts of the agent) to another company, which assumed the risks; *Held*, that the agency ceased, and that the contract does not confer a permanent right upon the agent to collect renewals and retain the 5 per cent. commissions.

2. But where an agency is associated with an interest, it cannot be revoked by the principal to the detriment of the agent. What such an agency is, stated by SMITH, C. J.

CIVIL ACTION, commenced before a justice of the peace and tried on appeal at Fall Term, 1883, of EDGECOMBE Superior Court, before *Shepherd, J.*

The defendant was constituted and became an agent of the plaintiff company in the prosecution of its business of life insurance, under and by virtue of a contract mutually entered into, and in these words:

Memorandum of an agreement between the North Carolina State Life Insurance Company of the one part, and Orren Williams, of Edgecombe county, N. C., of the other part, witnesseth:

That the said company has appointed the said Williams its agent at Tarboro, N. C., for the purpose of soliciting applications for life insurance upon the terms and conditions following, to-wit: That upon premiums received for all kinds of policies, except endowment policies of less than twenty years, the said Williams shall receive a commission of twenty-five per cent. on first year payments, and five per cent. on renewals; and that upon endowment policies of less than twenty years he shall receive a commission of fifteen per cent. on first year payments, and five per cent. on renewals; that it shall be the duty of said Williams, on the first day of each and every month, to make to said company a detailed report of his doings as agent, and to pay over all moneys that may come into his hands rightfully belonging to said company.

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In witness whereof the parties have hereto set their hands, this 12th April, 1873.

For the Company:

O. H. PERRY, Supervising Agent.

ORREN WILLIAMS, Agent.

In pursuance of the agreement, and in the exercise of his agency, the defendant collected and had in his hands previous to the bringing of the suit, of the funds belonging to the plaintiff, the sum of \$109.85 not contested, which he refuses to pay, setting up as a defence a counter-claim for a larger amount alleged to be due as damages under the provisions of the contract.

The plaintiff company, unable to successfully conduct its business, sold out and assigned many policies, secured through the active efforts of the defendant, to another life insurance association, which assumed its responsibilities and undertook to carry out the arrangements and contracts between the assured and the assignor insuring company, in like manner as the latter had undertaken.

Since the transfer and discontinuance of the functions of the plaintiff, renewals have been effected upon two of the said policies through another agency employed by the assignee, the commissions on which at the rate specified in the agreement exceed the plaintiff's demand, and for this excess the defendant claims to be entitled to judgment.

Upon the hearing on the appeal in the superior court, judgment was recovered by the plaintiff for the amount of the claim and the defendant appeals.

Messrs. Walter Clark and J. L. Bridgers, Jr., for plaintiff.

Mr. George Howard, for defendant.

SMITH, C. J., after stating the above. The only question

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presented is in reference to the construction of the contract of agency, and the rights of defendant thereunder.

The entire structure of the agreement for the creation of the agency, while silent as to its duration, evidently contemplates a continued connection between the service to be rendered and the compensation provided therefor, and is terminable at the election of either party. It may be put an end to by the principal. Story on Agency, § 463; by the renunciation of the agent, § 478; by operation of law where an incapacity in either party to maintain the relation is brought about, § 481.

The exception to the rule is where the agency is associated with an interest, and then it is not revoked, nor revocable by the principal to the detriment of the agent. What such an agency is, is thus explained by Chief Justice MARSHALL in the opinion in *Hunt v. Rousmanier*, 8 Wheat., 174, cited in brief of plaintiff's counsel: "We hold it to be clear," say the court, "that the interest which can protect a power, after the death of a person who creates it, must be an *interest in the thing itself*. In other words, *the power must be engrafted on an estate in the thing*. The words themselves seem to import this meaning. A power coupled with an interest is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest,' an interest in that which is to be produced by the exercise of the power, then they are never united."

Tested by the rule thus laid down, it is manifest that when the authority to insure ceases, the capacity of the agent ends also, and the relation of the parties terminates.

Accepting this, the defendant claims compensation in damages for the withdrawal of the power to continue to act in the renewals, and measures his loss by the sum he would have received as commissions had he been permitted to act in two renewals made since the transfer.

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This contention involves the assumption that the contract confers an absolute and permanent right to proceed with renewals when the original insurance was effected through the efforts and instrumentality of the defendant, when he can no longer act as agent in making the renewals.

Such is not the fair interpretation of the terms of the contract, which allows the specified commissions, as compensation for services to the company in the renewals, and necessarily ceases when the services cease.

The right to compensation is associated with a continuance of services, and the compensation is the agreed measure of their value. When the policy first issues, the per centum specified becomes due, and on each renewal the reduced per centum is allowed. Very manifestly the scope of the agreement conferring the authority is to provide the measure of remuneration for what the agent may do while he remains such, and no further. He was not to be paid for renewals afterwards made, unless participated in by him while in possession of authority to renew. Although renewals are the consequence of the original contract of insurance, and in this particular beneficial to the company, yet the full compensation given and accepted for this service is the twenty-five per centum on the sum received, provided in the contract which creates the agency and regulates its terms. This is in our opinion a fair and reasonable interpretation of the instrument, and the result is adverse to the counterclaim.

It must be declared there is no error in the ruling and the judgment must be affirmed.

No error.

Affirmed.

GAS MACHINE CO. v. NEUSE MFG. CO.

LAY GAS MACHINE COMPANY v. FALLS OF NEUSE MANUFACTURING COMPANY.

Pleading, complaint and answer.

A complaint which alleges that a certain matter was within the personal knowledge of the defendant, is not met by an answer "that defendant has no knowledge or information sufficient to form a belief" in reference to it. The ruling of the court below that the answer admits the plaintiff's cause of action and offers no sufficient defence, is approved.

CIVIL ACTION, tried at March Special Term, 1884, of WAKE Superior Court, before *Avery, J.*

The complaint alleges and the answer admits that, about the middle of October, in the year 1881, the plaintiff sold the defendant a certain machine for the generation of gas, at the list price of nine hundred and seventy-five dollars, subject to a discount or deduction of one-third of that sum, and on the terms that the defendant should have it on trial for ninety days, during which, if dissatisfied with its operation, he could return it, and plaintiff would take it back. The plaintiff further states that about the month of February thereafter he forwarded the machine to the defendant, who retained possession for more than twelve months thereafter without making any complaint, and that upon demand he refuses to make payment. To this last averment the defendant replies that he "has no knowledge and no information sufficient upon which to found a belief as to the time when complaint was first made about the machine."

The defendant says that the ninety days was to be computed from the time when he began to use the instrument, and he sets up as a defence that the machine "is not a good and sufficient machine, and is so defective that it does not generate the quantity and quality for which it was bought,

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and which it was represented by the plaintiff it would certainly generate, and further, that after a full and fair trial " it is not worth more than one half of the price of \$650.

The court, being of opinion that the answer admits the plaintiff's cause of action and offers no sufficient defence, on motion of plaintiff's counsel, rendered judgment for the amount of the plaintiff's claim with interest, and the defendant appealed.

Messrs. D. G. Fowle and Armistead Jones, for plaintiff.

Messrs. Fuller & Snow and E. C. Smith, for defendant.

SMITH, C. J., after stating the case. We concur in the opinion of the court that while the answer concedes the contract of indebtedness, it sets up no legal defence to the plaintiff's recovery.

It is sufficient answer to an allegation of a matter within the personal knowledge of the defendant for more than a year and failure to present or make known his dissatisfaction, to say knowledge or information sufficient to form at the time when complaint was first made, without that any was made at all. Facts charged to be known by the party ought to be met, if not admitted, with a direct denial, or the want of recollection if they cannot be recalled to memory. *Pomeroy on Rem. & Rem. Rights*, § 641, and cases cited in note; *FIELD, J.*, in *Curtis v. Richards*, 9 Cal., 33.

The defence arising upon a supposed warranty of false representation is unavailing, since the parties in their agreement provide for a return of the machine at the defendant's election after a sufficient trial; and this method of redress supersedes the others, if any other upon the facts is open to the defendant in the absence of that agreed upon.

Whether the answer be deemed frivolous or a concession

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of the plaintiff's right of action, to which no legal defence is offered, the ruling of the court and the rendition of the judgment was correct in law and must be upheld. Let the judgment be affirmed.

No error.

Affirmed.

SAMUEL RUFFIN and others v. C. B. HARRISON and others.

Rehearing.

Where the grounds of error assigned in a petition to rehear are substantially the same as those argued and passed upon in the former hearing, the court will not disturb its judgment; nor in such case will an order restraining the collection of an execution upon the judgment be granted.

(*Watson v. Dodd*, 72 N. C., 240; *Lockhart v. Bell*, 90 N. C., 499, cited and approved.)

PETITION to rehear heard at October Term, 1884, of THE SUPREME COURT.

This petition was filed by the defendants who also submitted a motion for an order restraining the collection of the execution, heretofore issued, until the matters set forth in the petition are passed upon. See same case reported in 81 N. C. 208; 86 N. C., 190; 90 N. C., 569.

Mr. J. B. Batchelor, for plaintiffs.

Messrs. Fuller & Snow and *E. C. Smith*, for defendants.

MERRIMON, J. In this case, the defendants, Ellis and wife, and Penelope Egerton, filed their petition at the present term to rehear, and pray the court to make an order restrain-

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ing the collection of the execution heretofore issued, until the petition to rehear shall be heard and determined.

The order of restraint asked for will not be granted in any case as of course; it will be granted only in the sound discretion of the court, and when it appears that there is reasonable and probable grounds for the application to rehear. If the rule were otherwise, frequent applications might be made to rehear for the real purpose of delaying the enforcement of the judgment by execution or otherwise.

Hence, we have looked into and considered the petition, to see if there are set forth in it such causes as warrant us in granting the preliminary restraining order, and we are of opinion that there are not such causes specified.

The grounds of error assigned are substantially and in all material respects, views of the case earnestly pressed upon our attention in the argument of counsel at the last term, and some of them at former terms of the court, but which the court declined to accept as sound and such as ought to be adopted.

The case was ably and elaborately argued at the last and former terms. It was not hastily considered, but the court gave it much and careful consideration. It is not alleged that any material point was overlooked, nor is it suggested that we failed to examine some direct and weighty authority in favor of the defendants, that is now brought to our attention.

The case was very fully heard and in respect to the several matters alleged as grounds of error, as well as others. So that, really, the court is now called upon to rehear the case thus thoroughly heard, reverse, or materially modify its decision without any consideration moving it thereto other than such as have heretofore been so considered.

It is settled that the court will not thus reverse its de-

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cisions solemnly made. *Watson v. Dodd*, 72 N. C., 240; *Lockhart v. Bell*, 90 N. C., 499.

The preliminary motion for a restraining order is denied.
Motion denied.

E. G. DANIEL, Adm'r, v. W. H. BELLAMY and others.

Practice in Probate Court—When Court cannot take judicial notice of judgment—Pleading.

1. During the pendency of a special proceeding against an executor for an account, it appeared that the will of the testator "was revoked and annulled" by a decree of the probate court in another proceeding; *Held*, that the defendant executor must amend his answer by setting up such decree. The granting of the defendant's motion to dismiss for want of jurisdiction was erroneous.
2. The court in such case cannot take judicial notice of a decree rendered by it in a separate and independent action, but the party seeking advantage thereunder must plead it in a proper manner. (*Rowland v. Thompson*, 64 N. C., 714; *King v. Kinsey*, 71 N. C., 407; *Wood v. Skinner*, 79 N. C., 92, cited and approved.)

SPECIAL PROCEEDING for an account, heard on appeal at January Special Term, 1884, of NEW HANOVER Superior Court, before *Gilmer, J.*

This proceeding was begun on the 7th day of July, 1878, in the probate court of New Hanover county. It is alleged that Daniel L. Russell died in the year 1871, leaving a last will and testament, in which he appointed the defendants executors thereof; that said will was duly proved and the defendants qualified as such executors; that the plaintiffs are creditors of the testator, and this proceeding is brought by the plain-

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tiffs on behalf of themselves and all other creditors of the testator who will join in it, to compel the defendants as such executors to account with them and pay their several debts respectively according to law, when they shall be duly ascertained.

The defendants, in their answer, deny that the said Daniel L. Russell died leaving any such last will and testament, and that they are executors as alleged in the complaint.

The plaintiffs made replication to the answer, averring the truth of the allegations in the complaint.

Thereupon the court of probate transferred the papers to the superior court to the end that that court might try the issues raised by the pleadings.

The superior court gave judgment for the plaintiffs, and remanded the case to the court of probate, with instructions to the clerk of the superior court to proceed according to law.

The court of probate then, at the instance of the plaintiffs, notified the defendants to appear before it on the 14th day of June, 1883, to the end, that the clerk of the court might take and state an account, &c. On that day the plaintiffs and defendants appeared accordingly. The defendants declined to account, and moved to dismiss the action, upon the ground that the court of probate had no jurisdiction over the estate of the said late Daniel L. Russell. The plaintiffs, pending that motion, moved for judgment according to the prayer of the complaint, and likewise for an attachment against the defendants for contempt in failing to account.

The court of probate then proceeded to find that the will of the said Daniel L. Russell had theretofore, but pending this action, been revoked and annulled by that court, more than six months before the plaintiffs proceeded in their motion for an account; that the plaintiffs were permitted to appear and oppose such revocation, although they were not

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parties to the proceedings instituted for that purpose, and, therefore, had notice thereof more than six months before they proceeded in their motion in this action. . The court further found that the plaintiff, F. D. Koonce, applied in that court to be appointed administrator of the said Daniel L. Russell, deceased, the said will having been revoked, which application was denied, because, it appeared to the court, that an administrator had been appointed by the court of probate in the county of Brunswick, where the deceased had a domicile at the time of his death. The said Koonce appealed from the judgment, denying his application, to the superior court, and his appeal is still pending in that court.

Thereupon, the court granted the motion of the defendants, and gave judgment dismissing the action, and denying the motion of plaintiffs. The plaintiffs appealed from that judgment to the superior court, and that court, at the January term, 1884, adjudged that the judgment of the probate court was erroneous, and remanded the case to the latter court with instructions to proceed to take and state an account of the administration of the defendants according to law. The defendants excepted and appealed.

Mr. DuBrutz Cullar, for plaintiffs.

Messrs. Russell & Ricaud, for defendants.

MERRIMON, J., after stating the case. We are of opinion that both the court of probate and superior court misapprehended the proper course that ought to have been pursued in the former court, where the defendants moved to dismiss the action for want of jurisdiction.

It seems, that pending this action, the probate of the will of the testator of the defendants was "revoked and annulled" by the court of probate, and the defendants desired to avail themselves of the action of the court in that res-

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pect. In order to do this, they ought to have made a motion for leave to amend their answer and plead, that pending the action the probate of the supposed will had been revoked and they discharged accordingly, and such other matters as they might have the right to set forth in the answer. If the court had allowed this amendment, as ordinarily it ought to do, the plaintiffs ought in such case to have been allowed to demur, or reply to the amended answer, if they had so desired. Then, if issues of law or fact, or both, had been raised by the amended pleadings, the same should have been transferred or taken by appeal to the superior court for trial at the next succeeding term thereof as directed by THE CODE, § 116. *Rowland v. Thompson*, 64 N. C., 714; *King v. Kinsey*, 71 N. C., 407; *Wood v. Skinner*, 79 N. C., 92.

The court of probate erred in supposing that because the probate of the will had been revoked in that court, it could take judicial notice of and act upon such revocation in the absence of any pleading on the part of the defendants, setting it up as a defence. The revocation of the probate of the will was done in a proceeding in no way connected with this action, however much it might affect it when properly pleaded. The court must not only have knowledge of a defence a party might make, but it must have knowledge of it well pleaded. The defendants, in order to avail themselves of the revocation, could only do so by properly pleading it, just as they would any other defence they might have the right to make. It might be that the plaintiffs would deny the revocation of the will, or its validity. They might desire to demur or reply to the amended answer. This they could not do, upon a mere suggestion of a defence upon the part of the defendants, of which the court happened to have personal knowledge, obtained through another action or proceeding in the same court. The plaintiffs might desire and have the right to raise issues of fact

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that the court of probate could not try, because the statute, (THE CODE, §116,) provides that such questions shall be tried in the superior court. And questions of law should be presented in an orderly way, so that either party might appeal from the decision of them to the superior court. No question of jurisdiction appeared upon the face of the pleadings, and the defendants could not raise it by mere suggestions, but only by an amended answer.

So much of the judgment of the superior court as reversed the judgment of the court of probate was correct, but so much of it as directed that court to proceed to take and state an account of the administration of the defendants was erroneous. The order ought to have directed such account to be taken, unless the court should, upon application of defendants, for proper cause shown, allow them to amend their answer and set up the alleged revocation of the probate of the will, &c., and the judgment of the superior court must be so modified.

Let this opinion be certified to the superior court to the end its judgment may be modified in conformity thereto, and the case thence remanded to the court of probate. It is so ordered.

Error.

Modified.

W. J. TEMPLE and others v. WILLIAM WILLIAMS, Adm'r.

Account and Settlement—Guardian—Receiver—Estoppel.

1. A receiver appointed to take charge of a ward's estate when the guardian is removed, is not invested with the powers of a guardian, but acts under the control of the court until another guardian is appointed.

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2. A settlement made with such receiver, even if had under direction of the court, is not conclusive against the ward, but only raises a presumption that the account and settlement are correct; hence, in this case, the paper writing intended as a "discharge and release" to the defendant administrator, not reported to or sanctioned by the court, can in no way affect the plaintiffs' right to an account. Such presumption may be disproved.
 3. The plea of estoppel by former judgment, to be available, must show that the claim in suit has been determined in a former action between the same parties.
- (*Becton v. Becton*, 3 Jones Eq., 419; *Falls v. Gamble*, 66 N. C., 455; *Tuttle v. Harrill*, 85 N. C., 456; *Latta v. Russ*, 8 Jones, 111; *Finger v. Finger*, 64 N. C., 183; *Bryan v. Malloy*, 90 N. C., 508, cited and approved.)

CIVIL ACTION, heard at July Special Term, 1884, of PASQUOTANK Superior Court, before *Shepherd, J.*

This action is brought to compel the defendant administrator to render an account and make settlement of the same.

It appears by the record that John Temple died intestate some time in the year 1860, leaving surviving him as his only heirs-at-law and next of kin the plaintiffs, William T. Temple and Delia Ann Temple, then infants of tender years. The defendant, Williams, was duly appointed administrator of the estate of said intestate.

Delia Ann Temple intermarried with the plaintiff, Griffin Hewitt, while she was yet an infant, and died intestate and under coverture, about one year next before the bringing of this action, and her said husband was duly appointed administrator of her estate.

Some time prior to 1872 Joseph S. Jones was appointed receiver under the statute, (Acts 1868-'69, ch. 201, §§ 22 and 47. THE CODE, § 1585-1610) to take possession, &c., of the estate of the plaintiff.

William T. Temple and the plaintiff Hewitt were like-

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wise appointed *receivers* to take possession of the estate of Delia Ann Temple.

In 1872 these receivers executed to the defendant Williams, administrator, a paper writing, of which the following is a copy:

This is to certify that the undersigned, the next of kin or some of the next of kin of the late Joseph Temple, deceased, have examined the account current of the estate of Wm. Williams, Jr., the surviving administrator of said Joseph Temple, and being satisfied with the same, do, in consideration of ten dollars to them paid, discharge and release the said Wm. Williams, Jr., surviving administrator as aforesaid, and the sureties on the bond given by himself and co-administrator, from all liabilities, claim and demand on account of the administration of the estate of the said Joseph Temple.

In testimony whereof, we have hereunto set our hands and seals this day of, A. D., 1872.

(Signed)

JOSEPH S. JONES, [seal,]

Receiver for W. J. Temple.

GRIFFIN HEWITT, [seal,]

Receiver for D. A. Temple.

But they, in fact, received no money or money's worth from the defendant Williams, or any other person, at that or any other time; nor was there *any other accounting* between the said receivers and the said administrators. It seems that the receivers received some notes and bonds of no value on persons totally insolvent. It does not appear, that the said receivers executed said paper writing by the direction of the court appointing them, or that it in any way sanctioned the same.

It is alleged in the complaint, that the paper writing above set forth was obtained by fraudulent representations

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made to the said receivers by the defendant Williams, and evidence was introduced tending to establish that fact.

The defendant pleaded the said paper writing as a release and discharge of his liability, denied the alleged fraud in procuring it, and introduced evidence tending to disprove the same.

Quinton T. Sexton, on the 10th of May, 1869, brought his action to the spring term of that year of the superior court of Pasquotank county against the defendant Williams, administrator of said Joseph Temple, and the said William J. Temple and Delia Ann Temple, as heirs at law of the said intestate. They were at that time infants, and the court appointed Joseph S. Jones to be their guardian *ad litem*, in that action. No summons was served upon them. The service of the summons and the complaint was "*accepted*," on the day it was issued, by the said Williams, administrator, and by the said Jones as guardian *ad litem*.

The material parts of the complaint in that action charged in substance, that the said Joseph Temple died intestate in 1860, and the said Williams was appointed administrator of his estate; that the said William J. Temple and Delia Ann Temple and George T. Temple were his only heirs at law; that the said intestate, in his life time, as guardian of the plaintiff, owed him \$1,983.16; that the said Williams, administrator, had *exhausted the personal estate* of his said intestate in the payment of funeral expenses, debts, &c.; that the said Joseph Temple died seized of large and valuable real estate which descended to his said heirs at law; that the same was liable and ample to pay the plaintiff's said debt; and that the plaintiff was willing to accept a certain tract of land of the said real estate in discharge of his said debt.

The said Williams, administrator, in his answer, confessed the substance of the complaint and suggested that the offer of the plaintiff to accept the tract of land in discharge of his debt, was a fair one and ought to be accepted. The said

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Jones, as guardian *ad litem*, filed an answer for his wards, confessing the allegation of the complaint, and particularly that the *assets in the hands of the said administrator* had been exhausted in the payment of debts, &c., and advised that the plaintiff's proposition to take the tract of land be accepted.

The plaintiff and the defendants in that action, the said Jones representing his said wards, agreed in writing "to refer all the matters in dispute between them" to referees, and "to abide by the decision of said referees as to matters of law and fact as is provided by law."

The court made an order of reference in pursuance of that agreement.

The referees reported that the said Joseph Temple was the guardian of the said plaintiff, and at his death had possession of his ward's estate; that there was due to the plaintiff \$1,983.16; that a large part of this sum was the proceeds of land of the plaintiff sold by order of the court of equity; that the personal estate of Joseph Temple in the hands of said administrator had been exhausted in the payment of debts, &c.; that the proposition of plaintiff to take the said tract of land in discharge of his debt was reasonable and proper, and that a decree be made by the court directing that the defendants make title in fee to plaintiffs and the defendants pay the costs.

The court at the said spring term made a decree confirming the said report, and directing the said Williams, administrator, and the other defendants, as such heirs at law by their said guardian *ad litem*, to convey to the plaintiff in fee the said tract of land, and upon the execution of such conveyance, that the plaintiff should execute a release and discharge to said administrator for said debt, and that the defendants pay all the costs including attorney's fees.

The defendants in the present action pleaded the record in that action as an estoppel upon the plaintiffs. They like-

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wise pleaded the statute of limitations. Issues were agreed upon by the parties, and, with the findings of the jury, are as follows :

1. Was there a final account between the parties to the receipt or release, and was said receipt or release executed in pursuance thereof? Answer—Yes.

2. Were notes of the estate turned over to Jones and Hewitt in pursuance thereof? Answer—Yes.

3. Was the said receipt or release obtained by reason of the fraudulent representations of the defendant, Wm. Williams? Answer—No.

Whereupon the plaintiffs asked for judgment upon the pleadings, admissions and findings of the jury, which was granted by the court, and the defendants appealed.

No counsel for plaintiffs.

Messrs. Grandy & Aydlett, for defendants.

MERRIMON, J., after stating the case. The court treated the issues submitted and the verdict of the jury upon them as immaterial, and held that, upon the face of the pleadings, the allegations of the complaint and the admissions of the answer, the plaintiffs were entitled to have an account of the estate of the intestate in the hands of the defendant Williams, administrator, taken, and gave judgment accordingly.

We think the judgment thus granted was a proper one, and that the exceptions of the defendants cannot be sustained.

It appears that the plaintiff William T. Temple and his late sister, Delia Ann Temple, the intestate of the plaintiff Hewitt, were the only next of kin of the intestate of the defendant Williams, administrator; that he never rendered any account of his administration to these next of kin, or to the plaintiff, Hewitt, administrator; but it does not ap-

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pear that he certainly ever rendered any account thereof to any proper authority, and at all events, any account thereof binding and conclusive upon the plaintiffs.

The plaintiffs are, therefore, plainly entitled to have an account taken under the order of the court to ascertain what property and effects went into the hands of the defendant Williams, administrator, what disposition he has made of the same, and what, if anything, is due to the plaintiffs according to their respective rights.

The defendants, however, insist that some time prior to 1872, in a proper proceeding for the purpose, Joseph S. Jones was appointed receiver of the estate of the plaintiff, William T. Temple, then an infant, and the plaintiff Hewitt was likewise appointed receiver of the estate of the said Delia Ann, then an infant and his wife, and that these receivers examined an "account current" of the defendant Williams, administrator, were satisfied with the accuracy and justness of the same, and executed to him a "discharge and release" from all liability to account further to the plaintiffs, a copy of which is set out above: and that this "discharge and release" is effective, conclusively binding upon the plaintiffs, and cuts them off from all right to sue for and have an account as demanded in this action.

This paper writing has not the plenary effect the defendants attribute to it. The statute, (Acts 1868-'69, ch. 201, § 22, THE CODE, § 1535) authorizes the court to appoint a receiver in case of the removal of a guardian, for the causes specified, "to take possession of the ward's estate, to collect all moneys due to him, to secure, loan, invest or apply the same for the benefit and advantage of the ward *under the direction and subject to such rules and orders in every respect as the judge may from time to time make in respect thereto, and the accounts of such receiver shall be returned, audited and settled as the judge may direct.*" Such receiver is to serve a temporary purpose in place of a guardian, to man-

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age and care for the ward's estate under the direction, supervision and control of the court, until another guardian shall be appointed; hence, it is provided, that as soon as another shall be appointed, he may apply to the court at once for an order upon the receiver to pay over to him all the money, estate and effects of the ward. (§ 24 of act cited). The duties of the receiver are special in their nature. He is not invested by the law with the powers of a guardian. He acts under the direction of the court, and his action has effect because the court directs and sanctions the same.

The action required by the statute (§ 47 of act cited) to be taken by the solicitor, in the cases provided for, is properly an action brought by him for the benefit of the ward when the guardian has been removed, and the infant is not a necessary, perhaps not a proper party to it. *Becton v. Becton*, 3 Jones Eq., 419. The infant is not, therefore, bound as a party to it by the record made in that behalf, and it is not conclusive upon him when he may afterwards, suing by his next friend, or suing after he comes of age, call his former guardian to account. The settlement with a guardian made by the receiver under the direction of the court only raises a *prima facie* presumption that the account and report based upon it are correct.

The present statute is substantially like that in the Revised Code, ch. 54, § 14, and takes the place of it. This court, in construing that statute in *Becton v. Becton*, *supra*, decided that the ward was not a necessary party to a proceeding to appoint a receiver under it, and that a settlement with the guardian authorized by it was not conclusive upon his rights.

The court in deciding that such settlement raised simply a presumption in favor of the guardian, say: "If it were allowed a greater effect, the proceeding by the attorney-general or solicitor would, in many cases, be prejudicial to

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infants, and it would have been better to have left them to the remedies which they had before the act was passed."

It was not intended that the proceedings under the act referred to should conclude the ward as to his right to call the guardian to account.

So that, in this case, if the paper writing mentioned above, intended as a "discharge and release" to the defendant Williams, administrator, had been sanctioned by the court, it would not be conclusive upon the plaintiffs. It would only, in such case, have raised a presumption in favor of the administrator that the plaintiffs might disprove.

It does not appear from the record that the court in the proceedings in which the receivers were appointed, authorized them to examine the "account current" of the administrator, and in any contingency to execute the "discharge and release" mentioned; nor does it appear that the paper writing, or the transaction of which it purports to be evidence, was ever reported to the court, or in any way had its sanction. So far as appears they executed it without any authority. This was beyond the scope of their powers as receivers in the absence of the order or sanction of the court, and therefore, their action was officious, and can in no way conclude the plaintiffs.

The extraordinary action brought by Sexton against the defendant Williams, administrator, and the plaintiff William J. Temple, and his sister Delia Ann, cannot be upheld as an estoppel of record upon the plaintiffs. That action was brought against them while they were infants, as the heirs-at-law of the intestate of Williams, administrator, and it was no part of its purpose to require of the defendant Williams, administrator, either directly or indirectly, any account of his administration, nor was any such account ordered to be taken, or taken in any aspect of the case. The purpose was, to have the consent of the heirs-at-law, and in such shape as to bind them, to allow a credi-

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tor of the intestate of the administrator to have a certain tract of land, that descended to them from the intestate, in discharge of his debt, because the administrator represented that he had no assets to pay it. The action did not propose any inquiry as to what property and effects of the intestate had gone into the hands of the administrator, and what disposition he had made of the same, nor was any such inquiry instituted. The question of why he had no assets to pay the debt was not raised by the pleadings, nor was it intended to raise such question. There was no purpose to raise or settle any question between the administrator and the heirs-at-law as to his administration. The matter of litigation in that action was substantially different from that in this. The material questions embraced and settled by it were different from those presented in this action. The parties to the two actions are different, and the purposes are different. The object of the present action is to compel the defendant administrator to render an account in detail of his whole administration, to ascertain what property and effects went, and ought to have gone into his hands, what disposition he made of the same, and what is due to the plaintiffs respectively.

To sustain the plea of estoppel by former judgment it must appear that the matter, claim or demand in litigation has been tried and determined in a former action, and the identity in effect of the present and former cause of action must appear. Such a plea implies that, in effect, on a former occasion, the plaintiff brought an action against the defendant, or against one under whom the defendant claims, in respect to the very same cause of action now alleged, in which action judgment was given for the plaintiff or for the defendant.

Falls v. Gamble, 66 N. C., 455; *Tuttle v. Harrill*, 85 N. C., 456; *Latta v. Russ*, 8 Jones, 111; *Finger v. Finger*, 64 N. C.,

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183; *Russell v. Place*, 94 U. S. Rep., 606; Big. on Estoppel, 37, 39, 40, 103 *et seq.*; *Bryan v. Malloy*, 90 N. C., 508.

There is no error. Let this opinion be certified according to law.

No error.

Affirmed.

GEORGE TURNER, Adm'r, v. J. D. QUINN, Adm'r.

Appeal Bond.

An appeal bond is of no effect unless it be accompanied by the affidavit of one of the sureties that he is worth *double* the amount specified therein. THE CODE, § 560.

(*Lytle v. Lytle*, 90 N. C., 647; *Bryson v. Lucas*, 85 N. C., 397, cited and approved.)

CIVIL ACTION tried at Fall Term, 1884, of JONES Superior Court, before *Shepherd, J.*

The defendant appealed, and upon call of the case in this court the plaintiff moved to dismiss the appeal for the reasons stated in the opinion here.

Mr. S. W. Isler, for plaintiff.

Messrs. Faircloth & Allen, for defendant.

ASHE, J. The appeal bond sent up with the record to this court is justified as follows: "Personally appeared before R. C. Broadhurst who, being duly sworn, says he is worth the amount of the above bond over and above his homestead and personal property exemption and personal liabilities."

In this court there was a motion by the appellee to dis-

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miss the appeal, because the appeal bond was not justified according to law, in that, neither the surety nor principal thereto stated upon oath that he was worth double the amount of the said bond over and above his exemptions and liabilities, &c.

The statute is peremptory, that an undertaking upon appeal shall be of no affect unless it be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. THE CODE, § 560. The objection is well taken. *Lytle v. Lytle*, 90 N. C., 647; *Bryson v. Lucas* 85 N. C., 397.

The motion of the appellee must be allowed and the appeal dismissed.

Appeal dismissed.

JONATHAN WOOD and others v. GEORGE W. SUGG.

Dower—Estoppel—Partition cannot be had of an estate in remainder.

1. A widow filed her petition for dower which was assigned to her in the land in controversy. In a subsequent proceeding for partition the heirs at law contended that she had forfeited her dower by a second marriage, &c., and upon an issue submitted the jury find that dower had been assigned; *Held* that the court will assume the proceeding in dower to have been regularly conducted, and that the heirs were parties to it and therefore estopped by the judgment therein.
2. Co-tenants in reversion or remainder have no right to enforce a compulsory partition of land. The petitioner must show that he has an estate in possession whereby he may enjoy the present rents.

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(*Gay v. Stancell*, 76 N. C., 369; *Maxwell v. Maxwell*, 8 Ired. Eq., 25; *Hassell v. Mizell*, 6 Ired. Eq., 392; *Miller ex parte*, 90 N. C., 625; *Wade v. Dick*, 1 Ired. Eq., 313, cited and approved.)

SPECIAL PROCEEDING heard at July Special Term, 1884, of GREENE Superior Court, before *MacRae, J.*

This was a proceeding for sale of land for partition, commenced before the clerk and transferred to the superior court for the trial of issues raised by the pleadings. The facts disclosed by the evidence are as follows:

Jonathan Wood died in 1862, leaving a will by which he devised his entire estate, real and personal, to his wife Emily J. Wood, now Emily J. Lee, during her natural life or widowhood, and then over to his children. His widow qualified as administratrix *c. t. a.*, and administered the personal estate without appropriating any of it to her individual use. She remained in possession of the house and lot in controversy for many years, and then rented it out and received the rents and profits until she sold her interest in the house and lot to Sugg & Exum by deed on February 23d, 1881, and on March 23d, 1883, said Exum sold his interest in the same to the defendant Sugg, who, on February 23d, 1881, also purchased two of the children's shares in said land, the plaintiffs being the only other children, owning one share each as tenants in common, subject to the estate of the said widow.

The said Emily J. Wood, widow, on June 17th, 1866, intermarried with her present husband, Thomas J. Lee, and after said marriage, by proper proceedings, had dower assigned to her, covering the whole of the lot now in controversy. The said land was once sold for taxes and bought in by one Freeman, who was the agent of said Emily J. to rent out the said land. He retained the rents until he was repaid the amount of taxes which he had paid, and then the said Emily J. got the land back. It is not stated in the

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testimony whether any deed passed to Freeman for said land, or from Freeman to said Emily J. after he was reimbursed as aforesaid.

The defendant is in possession and resists a sale for division on the ground that plaintiffs cannot have the same in the life-time of said Emily J. Lee, whose estate and possession he now has.

The plaintiffs' counsel asked His Honor to instruct the jury that the said Emily, after enjoying the house and lot during her widowhood, was not after marriage entitled to have dower assigned in the same property. The judge declined this instruction, and rendered judgment on the verdict in favor of defendant, holding that plaintiffs could not in law have a sale for partition in the life-time of said Emily J. Lee, and the plaintiffs appealed.

There were several issues submitted to the jury, one of which was—"Did Emily J. Wood have dower assigned to her on the land described in the pleading? to which the jury responded, "yes."

Messrs. Faircloth & Allen and Geo. M. Lindsay, for plaintiffs.
Messrs. H. F. Murray and W. C. Munroe, for defendant.

ASHE, J. The plaintiffs contend in the court below that Emily J. Wood, the widow of the testator, Jonathan Wood, by her marriage had forfeited her dower, and requested the judge so to charge. In this court they contended that the widow had lost her right of dower by not dissenting from the will of her said husband within six months after the probate thereof, but this point does not seem to have been taken below, and therefore is not the subject of consideration here.

But to give the plaintiffs the benefit of both their contentions, they cannot avail them.

The record shows that the widow Emily, after her mar-

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riage with her present husband, Thomas J. Lee, filed her petition for dower in the lands of her first husband, and the land in controversy was assigned to her as dower. The plaintiffs were the children and heirs-at-law of her said husband, Jonathan Wood, and claim that, after the determination of the freehold interest of said Emily by her second marriage, they have a right to the immediate possession of the land as tenants in common with the defendant Sugg, who, by purchase from two of the heirs, was seized with two undivided shares in the same.

But the defendant insists that there never has been any determination of this life estate of said Emily; that by purchase from her he is the owner of her interest, and that the plaintiffs are only entitled to two undivided shares of land in remainder, after the death of Emily J. Lee; and having no seizin or right of possession, they are consequently not entitled to a partition or sale of the land for the purpose of partition. This position taken by defendant, we think, constitutes a valid defence to the plaintiffs' petition.

Upon the issue submitted to the jury—"Did Emily J. Wood have dower assigned to her on the lands described in the pleadings?" the jury responded in the affirmative. We must therefore assume that the proceedings in dower were had regularly according to the practice of the court, and that the plaintiffs who are heirs-at-law were parties to the proceeding. *Wade v. Dick*, 1 Ired. Eq., 313. When that is so, they are estopped by the judgment in the proceeding for dower. The decision in *Gay v. Stancell*, 76 N. C., 369, is conclusive upon this point. There, it is held that "where a fact has been decided in a court of record, neither of the parties shall be allowed to call it in question and have it tried over again as long as the judgment stands unreversed; therefore, in an action to recover the possession of a tract of land which had been allotted to her (the widow) as dower

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in an action theretofore had between herself and the plaintiffs (the heirs); *it was held* that the plaintiffs were estopped by the judgment in the former action."

This settles the question as to Emily's right of dower, and renders immaterial the inquiry whether she had forfeited her right of dower by her marriage with Lee, or by having failed to dissent from the will of her first husband within six months.

The defendant Sugg, by means of the several conveyances set forth in the record, became the owner of her life estate, and by purchasing the interest of two of the four heirs of Jonathan Wood, he became, by the merger of a moiety of the life estate of his two undivided shares of the remainder, the owner in fee simple of an undivided half of the land, and the owner of an estate for the life of Emily J. Wood in the other moiety owned by the plaintiffs. In other words, the defendant is the owner of one moiety in fee simple, and the plaintiffs are the owners of a moiety of the remainder.

At the common law, parceners only were compellable to make partition by a writ of partition, but the benefit of that writ was extended to joint-tenants and tenants in common by the statute of 31 and 32 HENRY VIII. By the former statute, none but tenants of the freehold who had estates of inheritance could have partition, and only against tenants of the freehold. By the latter, tenants for life or years might have partition, but not to affect the reversioner or remainderman. The essential provisions of these statutes are still in force in this state, with only a modification of the remedy. In 1787 an act was passed by the general assembly which gave to tenants in common of real estate the petition for partition, in place of the ancient writ of partition. Act 1787, ch. 274, § 1, (brought forward in the Revised Statutes and Revised Code). The construction put upon this statute is, that it applied only to such co-tenants

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as had seizin where the estate was freehold, but had no application to reversioners or remaindermen. *Maxwell v. Maxwell*, 8 Ired. Eq., 25; *Hassell v. Mizell*, 6 Ired. Eq., 392. And in so holding this court has followed the English decisions in construing the statute of HENRY VIII. Our act of 1787 has made no change in the principles of law applicable to partition, but has only changed the remedy.

Mr. FREEMAN in his work on Co-tenancy says: It is a general rule prevailing in England without exception, and also throughout a majority of the United States, that no person has the right to demand any court to enforce a compulsory partition, unless he has an estate in possession; one, by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the co-tenants thereof, § 446. The same doctrine is announced and maintained in 1 Wash. on Real Property, ch. 13, § 7, sub-div. 7.

In New York it has been held that proceedings in partition can be instituted only by a party who has an estate entitling him to immediate possession. *Brownell v. Brownell*, 19 Wend. 367. See also *Miller ex parte*, 90 N. C., 625.

In New Hampshire it is held: "To maintain a proceeding for partition the applicant must show a present right of possession," 36 N. H., 327. And again, that "one who is interested with others in a remainder or reversion, after an estate of freehold, cannot maintain a petition for partition of the lands in which he is so interested." 8 N. H., 93.

We might multiply authorities, but we deem those cited are sufficient to show that the principle is well established, that co-tenants in remainder or reversion have no right to enforce a compulsory partition of land in which they have such estate.

By the act of 1812, ch. 847, jurisdiction was given to courts of equity to order the sale of lands for partition, when an actual partition could not be made without injury to some of the parties; but it was held to apply only to

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such cases where partition might have been made at law. *Maxwell v. Maxwell*, and *Hassell v. Mizell*, *supra*. Now, by the act of 1808-'9, ch. 122, § 12, and THE CODE, § 1903, jurisdiction is given to the clerk of the superior court of the county where the real estate or some part thereof lies.

We are of opinion there is no error in the judgment of the superior court.

No error.

Affirmed.

THOMAS H. ATKINSON v. D. H. GRAVES.*Chattel Mortgage, defective for uncertainty—Executory contract.*

1. A chattel mortgage conveying a bale of good middling cotton which the mortgagor "may make during this year" passes no title; first, because it fails to designate the place where the same is to be produced; and secondly, because it does not identify the property so that it could be separated from other property of like kind raised by the mortgagor.
 2. Such instrument is in effect an executory contract, giving to the mortgagee only a chose in action, or right to sue for the value of the cotton, if not delivered.
- (*Robinson v. Ezzell*, 72 N. C., 231; *Cotten v. Willoughby*, 83 N. C., 55; *Harris v. Jones*, *Ib.*, 317; *Blakely v. Patrick*, 67 N. C., 40, cited and approved.)

CIVIL ACTION tried at Spring Term, 1884, of JOHNSTON Superior Court, before *Philips, J.*

This was an appeal from the court of a justice of the peace. The plaintiff brought the action to recover a bale of cotton from the defendant, and it was tried upon the following "case agreed":

John Cooper executed a chattel mortgage to the plaintiff

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Atkinson on the 10th of February, 1881, which was duly registered on the 18th day of the same month. The instrument is in these words: I, John Cooper, of the county of Johnston in the State of North Carolina, am indebted to T. H. Atkinson, agent, in the sum of four hundred pounds of good middling lint cotton for which he holds my note, to be due the first day of November, 1881, and to secure the payment of the same, I do hereby convey to him these articles of property, to wit, one bay stallion horse and one bale of good middling cotton that I may make or cause to be made or grown during this year, to weigh not less than four hundred pounds; but upon this special trust, that if I fail to pay said debt and interest on or before the first day of November, 1881, then he may sell said property or so much thereof as may be necessary, by public auction for cash, first giving twenty days notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay any surplus to me. Given under my hand and seal this 10th day of February, 1881. (Signed and sealed by John Cooper.)

During the year 1881, John Cooper made only one bale of cotton, which he packed. Besides this bale, he made two or three sacks of stained cotton which he sold in the seed. The packed bale he carried in October, 1881, to the defendant Graves, and delivered it in payment of the debt due him and secured by an agricultural lien in due form, dated 21st of February, 1881, and registered on the 26th of the same month. The bale of cotton weighed 408 pounds, and was low-middling in quality.

The plaintiff claims that the chattel mortgage vested in him title to the bale sold to the defendant, which the defendant denies and claims that the bale was not conveyed by the said chattel mortgage.

If the court be of opinion with plaintiff, judgment is to be entered in his favor for forty dollars, with interest from

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the 19th of October, 1881, and costs; but if with defendant, the appeal shall be dismissed. His Honor gave judgment in favor of the plaintiff, and the defendant appealed.

No counsel for plaintiff.

Messrs. E. W. Pou and F. H. Busbee, for defendant.

ASHE, J. It was formerly understood to be the law, that a chattel mortgage could only operate on property not in actual existence at the time of its execution, and could not cover future products of the land, if given before the land was sown or planted. But these decisions, in modern times, have been superseded by the general adoption of the principle that if the "thing sold or mortgaged be the natural product or expected increase of something to which the seller or mortgagor has a present valid right, the sale or mortgage will be good." Story on Sales, § 185. Or, in other words, whatever has a potential existence is the subject of sale or mortgage; for example, an unplanted crop or future products of a farm to be raised by one in possession of land as *owner or lessee* is the subject of sale or mortgage. Jones on Chat. Mort., § 143. So, the wine to be made from a certain vineyard, or the wool that shall grow upon a certain flock of sheep. Benjamin on Sales, 63.

These things have no actual existence, but as they are naturally expected to spring from something in which the owner has a present right, they have what is considered a potential existence, and are held to be the subject of sale or mortgage. Story and Benjamin *supra*; *Robinson v. Ezzell*, 72 N. C., 231; *Cotten v. Willoughby*, 83 N. C., 75; *Harris v. Jones*, *Ib.*, 317.

A mortgage or sale of a crop to be raised on a certain field or farm in the possession of the mortgagor or seller is as far as the principle has been carried in respect to unplanted crops; but it has never, as we are aware, been ex-

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tended to the products of the soil to be raised without designating the place where they are to be produced. In this particular the mortgage in question is radically defective.

It is defective in the further particular that it does not designate and identify the property sought to be conveyed, so that it could be separated from other property of like kind raised by the mortgagor. Benjamin *supra*, 257. It is quite as uncertain, if not more so, as the mortgage of "ten new buggies" out of a lot of fifteen buggies, which was held to be void for uncertainty; *Blakely v. Patrick*, 67 N. C., 40; or twenty sheep in a flock of one hundred; or ten head of cattle in a drove of fifty; or a thousand feet of saw-logs in a certain river, without further description to distinguish them from a much larger mass of logs belonging to the mortgagor in the same river, which is held to be void for uncertainty. *Croswell v. Allen*, 25 Conn., 30.

The effect of the chattel mortgage was nothing more than an executory contract, which passed to the defendant only a chose in action which gave him the right to sue the mortgagor for the value of a bale of cotton, if not delivered; but it did not convey to him a chose in possession, so that he might maintain an action for the specific thing.

There is error. The judgment of the superior court is reversed.

Error.

Reversed.

STRICKLAND v. DRAUGHAN.

WILLIAM STRICKLAND v. W. H. DRAUGHAN.

Petition to rehear, time of filing—Limitations.

1. Petitions to rehear must be filed according to the requirements of Rule 12 and section 966 of THE CODE. This case falls within their provisions, and the defendant not having complied with the same, the plaintiff's motion to dismiss the petition is allowed.
2. Statute of limitations, its effect upon existing rights, and the legislative power over the remedy, touched upon.

PETITION to rehear heard at October Term, 1884, of THE SUPREME COURT.

This was a petition filed by the defendant to rehear a case in which judgment was rendered against him at February term, 1883. See report of case 88 N. C., 315.

Messrs. Boykin & Faison and W. A. Guthrie, for plaintiff.
Mr. J. L. Stewart, for defendant.

ASHE, J. The plaintiff moves to dismiss the petition, because it was not in apt time under the rules prescribed by this court in accordance with section 966 of THE CODE as set forth in Rule 12.

The rule reads: "A petition to rehear may be filed during the vacation succeeding the term of the court at which the judgment was rendered, or within twenty days after the commencement of the succeeding term, and upon the filing of such petition the chief justice, or either of the associate justices, may, upon such terms as he sees fit, make an order restraining the issuing of an execution, or the collection and payment of the same, until the next term of said court, or until the petition to rehear shall have been determined."

The defendant resists the motion on the ground that Rule 12 has no application to this case: that the petition is filed

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under the former rule, and under that he had the whole of this term in which to file his petition, and that it was in apt time.

But we are of the opinion the objection was well taken and the motion of the plaintiff should be sustained.

It is well settled that the legislature may change the remedy, and as the statute of limitations applies only to the remedy, that it may also change that, either by extending or shortening the time; provided in the latter case a reasonable time is given for the commencement of an action before the statute works a bar.

In *Terry v. Anderson*, 95 U. S. Rep., 628, Chief Justice WAITE, speaking for the court, said: "This court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of the action before the bar takes effect. *Hawkins v. Barney*, 5 Pet., 451; *Jackson v. Lamphire*, 3 Pet., 280; *Sohn v. Waterson*, 17 Wall., 596; *Christmas v. Russell*, 5 Wall., 290; *Sturges v. Crowninshield*, 4 Wheat., 122."

He further says in the same opinion, that parties have no more vested interest in a particular limitation which has been fixed, than they have in the form of the action to be commenced, and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remains. Strictly, the principle he announced applied only to the statutes of limitation.

It could have no application to this case, for there was no statute before November, 1883, giving time to parties to actions at law to file petitions for rehearing judgments rendered therein. That "any party within two terms after a judgment of this court (supreme court) may apply to have the cause reheard upon any matter of law," was simply a rule of practice adopted by this court which it had the right to alter or abrogate at any time at discretion.

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That rule was changed by Rule 12, and made a statutory provision by section 966 of THE CODE, which had the effect to abrogate the former rule. But as it did not take effect until the first of November, 1883, the former rule was in operation until that time, so that the defendant had until then to file his petition under that rule. But the rule ceasing to exist at that time, according to a strict construction he had no right to file his petition after that date, though possibly under a liberal construction in accordance with the spirit of Rule 12 and section 966, his petition might have been entertained if filed within twenty days after the first of November, but he failed to file it until the 14th of December thereafter.

Our conclusion is that the petition was not filed in apt time and must therefore be dismissed.

Petition dismissed.

*A. D. WADDELL, Adm'r, v. FRED J. SWANN.

Transaction with person deceased—Witness—Section 590.

1. A witness, party to the action, is not prohibited by section 590 of THE CODE from testifying as to communications made to other witnesses. Here, it does not appear that the declarations of the witness were made in the life-time of the deceased, or in his presence, if then made; and the court holds that they are in no sense transactions or communications with the person deceased.
 2. Section 580, disabling a party from giving evidence, applies to cases where both parties are living, and does not interfere with the operations of section 590.
- (*Lockhart v. Bell*, 86 N. C., 443 and 90 N. C., 499; *Woodhouse v. Simmons*, 73 N. C., 30, cited and approved.)

*Mr. Justice ASHE did not sit on the hearing of this case.

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CIVIL ACTION, tried at December Special Term, 1884, of of MOORE Superior Court, before *MacRae, J.*

The defendant appealed from the ruling and judgment of the court below.

Mr. R. P. Buxton, for plaintiff.

Messrs. J. W. Hinsdale and W. E. Murchison, for defendant.

SMITH, C. J. This action, brought by the plaintiff as administrator of Ann J. Swann, is to recover the amount due on a note under seal, executed by the defendant to the intestate on May 5th, 1862, for the payment, one day after date, of the sum of six hundred eighty-seven dollars and twenty-six cents. The defences set up in the answer, which admits the making of the note as described in the complaint, are, that the debt has been paid; that the presumption of payment arises from the lapse of time under the statute since January 1st, 1870; that the note is subject to reduction according to the legislative scale. And further, that the defendant has a counter-claim of larger amount than the plaintiff's demand. To the counter-claim the plaintiff sets up the statute of limitations as a bar.

The counter-claim was not insisted on, and the only inquiry submitted to the jury seems to have been (for no formal issues are found in the record) whether the note had been paid.

To rebut the statutory presumption and negative the inferred payment, the plaintiff introduced witnesses whose testimony tended to show that the defendant in the year 1882, (whether before or after the intestate's death, which occurred the same year, the record fails to show) acknowledged that he owed the note.

To meet and disprove this evidence, the defendant offered himself as a witness in respect to conversations deposed to,

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and proposed to testify that they did not occur, and that all he did say was simply that, "there was a note against him." Upon the plaintiff's objection the court ruled that the defendant was incompetent to testify to these matters under the inhibition of THE CODE, § 590, and refused to permit the examination. The exception to this ruling presents the only question brought up by the defendant's appeal.

The section referred to forbids the examination of a living party to an action depending between himself and the representative of one deceased in reference to any transaction or communication which passed between them, closing the mouth of the living witness when death has sealed the lips of the other.

It does not appear that these declarations were made in the lifetime of the intestate, nor, if then made, in her presence, so that if living she could testify in relation to them. So that in no sense are they transactions or communications with her. On the contrary the acknowledgments were uttered only in the hearing of the witnesses who prove them. As remarked in *Lockhart v. Bell*, 86 N. C., 443, where the competency of the creditor to testify to an endorsement in his own handwriting on a note of partial payment as put there by himself, in the absence of the debtor, was drawn in question, the court say: "The fact to which the testimony is pertinent, being shown to have occurred out of the presence of the deceased and in no sense a transaction with her, (and we see no reason why the preliminary matter affecting the competency of the party to testify may not be proved by him as well as by an indifferent witness), the statutory impediment is removed, and the objection ceases to have force."

This ruling was affirmed, and the construction put upon the disabling act approved upon the rehearing of the cause at a subsequent term. *Lockhart v. Bell*, 90 N. C., 499.

The cases in which the act was required to be interpreted

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are numerous, and will be found at the foot of section 590 of THE CODE.

The act of 1883, ch. 310, disables a party to an action on a judgment rendered or bond executed before August, 1868, where the suit was commenced before that date, from giving evidence, unless the defendant relies on an actual payment or pleads a counter-claim, and introduces himself to establish the defence. This enactment applies to such actions as are mentioned where the parties are both living, and was not intended to interfere with the operation of section 590, since in express terms it concludes, "But in all such cases the rules of evidence as contained in this CODE shall prevail." Section 580.

It was therefore error in the court to refuse to hear the testimony of the defendant as to what he said to the witness, so that the jury could properly estimate the value of the evidence. The defendant did not offer to prove that *payment had been made*, for this was inadmissible under the ruling in *Woodhouse v. Simmons*, 73 N. C., 30, but to *disprove his alleged admissions of a continuing indebtedness* upon the note, and we see no reason against his doing so.

There is error and must be a new trial. Let this be certified.

Error.

Venire de novo.

*A. D. WADDELL, Adm'r, N. FRED. J. SWANN.

Agency, proof of demand in—Pleading.

1. Where plaintiff alleged an agency, the liability of the agent and a demand upon him to account and pay over, and defendant denied the alleged agency; *Held* that while the plaintiff must prove

*Mr. Justice ASHE did not sit on the hearing of this case.

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the agency, yet the denial of the agency relieves him from proving a demand upon the defendant before suit brought. But where the agency is admitted, such demand must be proved.

2. The court suggest the proper issue to be submitted on another trial, and the manner in which the seeming variance between the allegations of the parties and their proofs may be put out of the way.

(*Vincent v. Corbin*, 85 N. C., 108; *Head v. Head*, 7 Jones, 620, cited and approved).

CIVIL ACTION, tried at December Special Term, 1883, of MOORE Superior Court, before *MacRae, J.*

The case is stated in the opinion. The plaintiff appealed from the judgment of the court below.

Mr. R. P. Buxton, for plaintiff.

Messrs. J. W. Hinsdale and *W. E. Murchison*, for defendant.

MERRIMON, J. It is alleged in the complaint that the intestate of the plaintiff in her life-time, being the owner of twenty-five shares of the capital stock of a railroad company, delivered her certificate for the same to the defendant, "in special trust and confidence, to sell and dispose of the same on her account, as her agent and trustee, and to account with her for the proceeds of sale, all of which he agreed to do;" that he sold the said stock and realized therefor the net sum of \$1,464.69, on the 20th day of September, 1873; that he never accounted to the said intestate in her life-time, nor to the plaintiff since her death for the said sum of money, or any part thereof; that the plaintiff, before the bringing of this action, demanded of the defendant that he render to him an account of such agency, and pay to him the said sum of money with the interest due thereon, &c.

The defendant in his answer to the complaint denies such agency, but says that in 1873 he was the agent of said in-

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testate, and as such received and sold said railroad stock and received the money therefor; that he accounted with the plaintiff's intestate in her life-time in respect to such agency, and was fully in all respects discharged from the same, and that he borrowed from the said intestate the said sum of money and promised to pay the same with interest; and as to his said promise to pay the said sum of money to the said intestate, he pleads the statute of limitations.

On the trial below the court submitted to the jury, among other issues, one as to whether or not the plaintiff made any demand before the bringing of the action for an account and payment of the money due to him on account of said agency.

The plaintiff offered no evidence in support of that issue, and insisted that inasmuch as the defendant had denied the agency in his answer, it was not necessary to prove a demand in that respect. The court, however, held that the plaintiff must prove such demand upon the defendant before the action was brought, else the action could not be maintained. To this ruling the plaintiff excepted.

The jury, by consent of plaintiff, in response to the issue, as to the demand, said, "not until the summons in this action."

We think the court erred in holding that the plaintiff must prove a demand upon the defendant that he account with him in respect of the alleged agency and pay him the money in his hands as agent of the intestate, before the action was brought.

The plaintiff alleged the agency, the liability of the agent and the demand upon him. These allegations the defendant broadly denied. This left the plaintiff to prove the agency, and that the agent had the money as alleged, but it relieved him from the burden of proving the demand. This is so, because the defendant, in denying the agency, denied that the money alleged to be in his hands

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as agent belong to the intestate of the plaintiff in her lifetime, or to the plaintiff as administrator of her estate.

Ordinarily, under the contract of agency, the agent is entitled to be notified by his principal to deliver to him the money or other thing in his hands as the agent, the object being to give him opportunity to do so without action. This notice or demand implies, and is given upon the supposition, that the agent recognizes the relation between himself and his principal, and that he will freely do his duty as required.

But, if he denies the agency, what purpose could a demand serve? It would be useless and nugatory. The denial raises a state of antagonism inconsistent with the purpose of a demand. The attitude of the agent towards the principal in such case is one of avowed hostility that prevails and continues until the court settles the matter and ends it by its judgment. A man cannot be allowed thus to claim the privileges and rights of a character which he refuses to recognize and sustain, and the duties and responsibilities of which he repudiates.

It was insisted in the argument by the counsel for the appellee, that the cause of action was not complete before the action was brought, because no demand was made, and, therefore, the action could not be sustained, and he further contended, that the plaintiff was not relieved from proving the demand because the defendant denied the agency in his answer.

The first part of this argument would be good if it stood alone; for if the defendant had admitted the agency, then the plaintiff could not recover without first proving a demand before the action was brought. But the unqualified denial of the agency in the answer is an admission that at no time would the notice have served the purpose contemplated by it; it is tantamount to saying, that any demand would have been an idle ceremony. The answer develops

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the fact that the defendant, from the beginning and before this controversy began, denied the agency and all liability arising from the relation created for it. It disclaims all occasion for and right of defendant to the demand or notice.

This seems to us to be a just and proper application of principle, and while we find no direct authority in our own reports sustaining, we find none contravening it. But there are many decisions that aptly illustrate the application of the same principle in similar cases. Thus, in *Vincent v. Corbin*, 85 N. C., 108, the plaintiff alleged that he was the landlord of the defendant, and the latter denied the allegation, and the court held, that the defendant was not entitled to notice to quit. In that case Mr. Justice ASHE said: "But, however well settled it may be, that a tenant from year to year is entitled to the regular six months' notice at common law, and three months by our statute, there is another principle of law well settled, *i. e.*, that where such a tenant sets his landlord at defiance, and does an act disclaiming to hold under him as tenant, this dispenses with the necessity of notice to quit; as, for instance, by attorning to another claiming the possession as his own." And so it was held in *Head v. Head*, 7 Jones, 620.

Tillotson v. McCrilles, 11 Vt. Rep., 447, the court held that where a man has received money as agent for another, but denies the agency and claims to have received it on his own account, he is not entitled to a demand before suit. And so also, where a plaintiff brought his suit to restrain a nuisance, without giving the defendants notice of his intention to take proceedings, and they by their answer justified the nuisance and insisted on their legal rights, *it was held* that the nature of the answer precluded the defendants from objecting to want of notice. *Attorney General v. Hackney Board of Works*, 44 L. J. Chan., 545; 7 Wait Act. & Def., 376.

In *Walradt v. Maynard*, 3 Barb., 584, it was held that where an attorney denies his liability to pay, and sets up a claim

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against his client exceeding the amount collected, this amounts to a waiver of a legal demand; and in *Ayers v. Ayers*, 16 Pick., 327, it was held that no demand on the defendant was necessary, it appearing by his answer that he denied the plaintiff's right; but that otherwise, a demand would have been necessary.

We notice that the defendant does not set up in his answer, as matter of defence, that no demand was made before the action was brought. He simply denies that demand was made. We are not here called upon to decide whether or not such a defence must be specially pleaded. There are authorities that seem to indicate that it must be so pleaded. *Wait supra*.

The court instructed the jury that the first and second articles of the pleadings—the complaint and answer—were substantially the same, and that the fourth article of the complaint and the fourth article of the answer raised the first issue, and that issue was, “did the defendant account with the intestate, Ann J. Swann, for the proceeds of the sale of the railroad stock?”

This was an erroneous view of the complaint and answer. The complaint alleged a continuing agency from some time (not definitely fixed) in 1873, until the bringing of this action. The answer did not admit this; on the contrary it flatly denied it, and averred that the defendant was a special agent, not such as alleged, in respect to the railroad stock, and it alleged “that he did not account with her (the intestate) for the said sum immediately after the said sale in the county of Moore, and that she then and there loaned to this defendant the said sum of money,” thus putting the agency as alleged—the continuing agency—directly in question. Therefore, the first material issue of fact raised by the pleadings was that as to the agency as alleged on the one hand and denied on the other.

This issue was not submitted at all, but an issue subordi-

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nate and collateral to it was submitted to the jury, to-wit, the issue as to whether or not the defendant had accounted with the intestate. This left the main issue to be determined collaterally and incidentally. The effect of this was to dwarf, obscure and entangle the main issue and lead the minds of the jury away from it. Such a practice might greatly prejudice a party. It is important in a substantial degree, that the material issues in all cases should be presented clearly and distinctly, and kept so before the minds of the jury, so that they may see and understand clearly what issues they are to try, and how the evidence bears upon them severally. In this case, who can say what might have been the verdict of the jury, if the issues as to the agency had been distinctly submitted to them, stripped of all collateral and entangling considerations? Will it be said that they had to pass upon the question of agency incidentally in order to determine whether the defendant accounted with the intestate for the money? Perhaps they did, but they did not see the evidence bearing upon it in the clear, strong light of a direct, distinct issue. The plaintiff had the right to have the main issue tried separately.

Regularly, only the material issues of fact raised by the pleadings should be submitted to the jury; the fewer the better, and collateral matters involving evidential facts should be put in evidence on one side or the other of the issue submitted. In some cases, collateral issues, with a view of fairness, and to meet the justice of the case may be submitted, but this practice ought not to be encouraged. A great number of issues tend to confuse the jury, darken their counsels and render their verdicts very uncertain and unsatisfactory.

The real purpose of this action is to compel the defendant to pay a sum of money he owed the intestate of the plaintiff, and as to the real merits of the matter, it is of lit-

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the importance whether he owed it as agent or as a borrower.

The jury in substance have found that the defendant owed the plaintiff \$1,464 69, with interest thereon; that this debt is not barred by the statute of limitation. The defendant admits that he owed it. He pleaded the statute of limitation, and this plea has been found against him. If the complaint conformed in form to the proof, it is manifest the plaintiff would be entitled to judgment. He moved for judgment upon the findings of the jury. His counsel thought he was entitled to it without amending the complaint, and it is not clear that he was not. It is not certain that the variance between the complaint and the proof was such in substance as to actually mislead or prejudice the defendant in making his defence, especially in view of his answer. At all events, the complaint might have been amended upon application to the court. The counsel applies here to amend, and perhaps this court might allow an amendment with a view to justice; but upon the whole we deem it better to award a new trial, on which the whole merits of the matter in litigation can be settled. It does not seem to us that the rights of either party have been satisfactorily ascertained. In one aspect of the case the plaintiff is entitled to recover; in another it would seem that the defendant is entitled to the benefit of the statute of limitation.

New trial awarded. Let this be certified according to law.

Error.

Venire de novo.

 KING v. FOSCUE.

LEWIS KING and wife and others v. E. M. FOSCUE.

Landlord and Tenant—Lease by Tenant for life—Remainderman—Constitutionality of Act—Agency.

1. A lease of land made by a tenant for life terminates at his death, but by statute the lease is continued to the end of the current lease-year that the tenant may gather his crop.
 2. But, in such case, the remainderman is entitled to a part of the rent proportionate to the part of the year elapsing after the termination of the life estate to the surrendering of possession to the remainderman. THE CODE, § 1749.
 3. The statute embraces a lease for a single year, although it provides in terms "for any lease for years."
 4. The legislature has power to regulate the method of transfer of property from one to another and hence the act above mentioned is constitutional.
 5. Where an agency is denied or repudiated, no demand upon the agent is necessary before suit brought.
- (*Gee v. Young*, 1 Hay., 17; *Poindexter v. Blackburn*, 1 Ired. Eq., 286, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1884, of JONES Superior Court, before *Shepherd, J.*

The action was commenced in a justice's court, and the plaintiffs complained that the defendant owed them ninety-one dollars for rents received by him from the lands of the feme plaintiff. The defendant denied the allegation.

It appears that one Harrison was tenant for life of certain lands in Jones county, and that the feme plaintiff was entitled to the remainder in fee therein; that Harrison in his life-time leased the land to a tenant for the year 1881, reserving certain rent in kind of the crops to be produced thereon; that Harrison died on the 14th of August in that year, leaving a last will and testament, and appointed the defendant executor thereof, and by which he gave him (the

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defendant) his whole estate ; that the will was duly proved and the defendant qualified as executor, and in the fall of said year collected the whole of the rents due under the said lease.

The feme plaintiff sues to recover such part of the rents collected by the defendant as she may be entitled to in remainder, demanding ninety-one dollars, and the justice of the peace gave judgment in favor of plaintiff for thirty-five dollars, and she appealed to the superior court.

On the trial in the superior court issues were submitted to the jury, who responded as follows :

1. Did defendant, in consideration of being allowed to collect the rents without objection on the part of the plaintiffs, promise to pay plaintiffs their share of the same? Answer—Yes.

2. If so, what amount is due to plaintiffs? Answer—\$81.07.

The court instructed the jury, as to the first issue, that they could only consider such part of the evidence as tended to show a promise by defendant to pay plaintiffs prior to the collection of the rents, and that plaintiffs were entitled to a proportionate part of the rents under THE CODE, § 1749. To the latter part of this instruction the defendant excepted.

There was no evidence to show any demand by plaintiffs on the defendant for the rents, before the action was brought.

After verdict the defendant moved for judgment *non obstante veredicto*, on the grounds, first, that under the findings of the jury in response to the first issue, the defendant was a mere agent of the plaintiffs, and a demand was necessary before the action could be sustained ; and secondly, that the feme plaintiff was not entitled to any part of the rents, and therefore the promise to pay was without consideration. The court denied the motion, and the defendant excepted and appealed from the judgment rendered.

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No counsel for plaintiffs.

Messrs. Strong & Smedes, for defendant.

MERRIMON, J. In this case, the lease executed by the owner of the life estate in the lands terminated upon his death, because he could not let the lands for a longer term than the period of his own life. He could not lease that which did not belong to him. Upon his death, the estate of the remainderman at once began, and a lease made by him terminated.

The statute, (THE CODE, § 1749) however, continues the lease in lieu of emblements in such a case, to the extent of occupancy on the part of the tenant until the end of the lease-year current at the time of the death that terminated it, to the end that he may mature, care for and gather the crops; and it provides, that he shall surrender possession to the succeeding owner of the land at the end of that year, and pay to him (the remainderman in this case) a part of the rent accrued since the last payment of rent became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor, until the time of such surrender of possession on the part of the tenant to the succeeding owner; and it likewise provides, for compensation to the tenant for tillage and seed of any crop not gathered or matured at the expiration of such current lease-year from the person succeeding to the possession.

The lease mentioned in this case, is for but one year, and it is insisted that the statute mentioned does not embrace such leases, because by its terms it applies to leases for more than one year. We think otherwise, and that such a construction would defeat in some measure the purpose of the legislature.

Although the statute provides in terms for "any lease for years of any land let for farming," &c., nevertheless, it embraces a lease for a single year. Its plain purpose is to ex-

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tend the lease for the current year to the extent of occupancy on the part of the tenant, to enable him to mature and gather the crops, and make provision in respect to the same as to rents accrued since the last payment, and to compensate the tenant for tillage and seed of any crops not gathered or matured at the end of the year. The necessity for such a statutory regulation applies quite as strongly to a lease for a single year, as to one for two or more years. The main object is to provide, not so much for leases *for years*, as for a lease, whether for a year, or for years, terminated by the happening of some uncertain event that puts an end to the estate of the lessor. By the common law, "the tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain. Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executor shall have the *emblements* or profits of the crop; for the estate was determined by the *act of God*, and it is a maxim in the law, that "*actus dei nemini facit injuriam*."

"The representatives, therefore, of the tenant for life shall have the emblements to compensate for the labor and expense for tilling, manuring, and sowing the lands, and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege the law can give it." 2 Bl. Com., 122; Taylor on L. & T., 355; *Gee v. Young*, 1 Hay., 17; *Poindexter v. Blackburn*, 1 Ired. Eq., 286.

The purpose of the statute is to regulate this subject, and very largely in the interest of the succeeding owner of the land, and its spirit clearly embraces a lease for a year. And indeed the phrase employed in the statute, "a lease for years," is used in a technical sense, like the similar phrase, "an estate for years," by which is meant, an estate for a

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definite period of time, and it embraces a lease for a single year. 2 Bl. Com. 140.

The objection that the statute under consideration is unconstitutional cannot for a moment be sustained. It is but a reasonable legislative regulation of the method and means whereby the remainderman, or succeeding owner, comes into possession and complete enjoyment of his estate. And indeed, as we have said, it is intended to, and generally does promote his interest and convenience. The legislature clearly has power to regulate the method of the transfer of property from one party to another, and although such regulations frequently incidentally affect the value, and sometimes the stability of private property, this cannot be regarded as interfering with vested rights. Such a legislative power is essential, and is frequently exercised in many ways. Cooley Const. Lim., 358, (1st Ed.)

The statute extended the lease mentioned in this case in lieu of emblements, from the date of the death of the tenant for life to the extent of occupancy on the part of the tenant, for the purpose of maturing and gathering the crops, to the end of the current lease-year; and by virtue of the statute, the *feme* plaintiff was entitled to a part of the rent, proportionate to the part of the year elapsing between the termination of the estate of the lessor, the tenant for life, and the surrender of the possession of the land to her.

The defendant, however, collected the whole of the rents due under the lease mentioned, and failed to pay the *feme* plaintiff any part of them. It is not denied that if she is entitled, he has her part of the rents. It is plain that she is entitled, and quite as plain that she can maintain her action for the money had and received, as well as upon the express promise to pay the rents.

It is insisted that the first issue submitted to the jury indicates and assumes that the defendant was the agent of the plaintiff to collect the rents; and, therefore, she cannot

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maintain this action until she first makes a demand upon the defendant for her part of the rents.

No formal pleadings were filed, the action having been begun in the court of a justice of the peace, where the pleadings are very summary and informal. Precisely how the plaintiff declared does not appear. There is nothing in the record that shows that the defendant was the agent of the plaintiff. The issue does not treat him as such agent; it seems to suggest that the feme plaintiff did not object to the collection of the rents by him, and he promised to pay her share thereof. But if he were such agent, as he now insists, he repudiated the agency by the denying the right of the plaintiff to any part of the rents. He put himself in hostility to her, and hence no demand was necessary. *Waddell v. Swann*, decided at this term, *ante* 108.

There is no error, and judgment must be entered in this court for the plaintiff. Judgment accordingly.

No error.

Affirmed.

JOHN H. STRAUSS v. NORRIS FREDERICK, Ex'r. and others.

Partnership.

1. Partnership effects must be appropriated to partnership debts, to the exclusion of claims of a creditor upon a member of the firm. And the rule is the same, where they are assigned by mortgage to one who has knowledge of their character and is a creditor both of the firm and of an individual partner.
 2. In such case the law makes the appropriation, and the creditor cannot elect, even with the concurrence of the surviving partner, as in this case, to make a different disposition of the effects to the prejudice of the estate of the deceased partner.
- (*Allen v. Grissom*, 90 N. C., 90, cited approved.)

CIVIL ACTION for foreclosure of mortgage tried at Spring Term, 1884, of DUPLIN Superior Court, before *Shepherd, J.*

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On November 2d, 1872, the plaintiff, at the request and for the accommodation of the firm of Frederick & Son, constituted of the defendant Norris Frederick and William C. Frederick, his son, executed his promissory note in the sum of five thousand dollars to said firm payable at thirty days, and the same having upon their endorsement been discounted at the bank, the proceeds were received and used in their business. On November 12 thereafter, the said William C. executed to the plaintiff a mortgage deed, conveying certain real estate of his own for the indemnity and security of the plaintiff against loss or damage by reason of his liability on said note, or on others which might be given in renewal of the said debt. Renewal notes were subsequently given until the indebtedness was reduced, in 1875, to one thousand dollars, and this sum the plaintiff testified was paid by himself, and that he had not been re-imbursed.

In the year 1875, William C. Frederick died, leaving a will, in which he appoints his father, the said Norris, his executor, and gives him power to carry on the same business. In 1878, the plaintiff and Norris came to a settlement, which showed an indebtedness to the former, made up, as the plaintiff alleges, of acceptances, individual and for the firm, and including interest on the residuary firm debt, for the four years preceding, in the sum of \$4,000, to secure which the defendant mortgaged the stock of goods on hand to the plaintiff who took the same into possession, and has realized therefrom the sum of \$2,100, which he has appropriated, as he claims a right to do, to the personal indebtedness of said Norris as provided in the deed conveying the goods, leaving unpaid the \$1,000 due from the firm.

The testimony of the defendant Norris varies from that of the plaintiff, and his statement is that the stock of goods surrendered to the plaintiff were to be used in discharging the \$1,000 debt, then in payment of a small debt due from Norris on account of the firm business, and the residue to

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be returned to him. He further denies that he owed the alleged debt of \$4,000, and says that the goods were conveyed to secure the plaintiff in advances that he might thereafter make to aid the defendant in a new business which he proposed to open.

The only issue passed upon by the jury was as to the sum paid for the firm, and whether it had been repaid to him in whole or in part.

The court was asked by defendant's counsel to charge that the plaintiff having full knowledge of the fact that the goods assigned to him were of the partnership effects, the proceeds arising from them should have been applied, and the law will thus dispose of them, in discharge of the partnership debt. The instruction was refused, and the jury were directed that if the plaintiff took possession under an arrangement with the assignor that the firm debt should be paid, then the verdict should be that it was discharged. But if the plaintiff did not come into possession under such arrangement, but under and by virtue of the mortgage and to enforce its terms, the plaintiff could apply the funds to the mortgage debt and the firm debt would remain. The jury found under the instructions, that the firm debt was not discharged.

The court therefore rendered judgment for foreclosure of the mortgage of the land conveyed by the testator, and the defendant appealed.

Messrs. Faircloth & Allen, for plaintiff.

Messrs. Battle & Mordecai and J. L. Stewart, for defendants.

SMITH, C. J., after stating the case. It is 'settled upon a series of adjudications in this court that the creditors of a copartnership, as such, have no lien upon the property and effects of the partnership, nor an equity to have them applied to the partnership debts in derogation of the right of

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the individual partner, with the consent of his associates, to dispose of them as he pleases. The equity to have this preferential appropriation resides in each member, as a means of personal exoneration, in accomplishing which the creditors only have relief. The subject is considered and the authorities examined in the recent case of *Allen v. Grisom*, 90 N. C., 90.

It is manifest that if the administration of the testator's estate had been committed to some other person, the right vested in the testator to require the joint property to be first applied to the joint liabilities, would have devolved upon his representative; and in fulfilling the assumed trusts, he ought to have enforced the equity in relief of the estate. The same obligation rests upon the defendant Norris, and what, as surviving partner succeeding to full legal ownership, he might have been compelled to do, in administering the partnership funds, he ought to do of his own accord. In other words, he should manage and use them as surviving partner under the coercion of the duty assumed in accepting the executorship of the deceased for the protection of the interests of the testator's estate. So where, in disregard of this equitable obligation, he transfers the joint effects to one who has knowledge of their character, and is both a creditor of the firm and of the individual partner, the same rule of appropriation must prevail and the moneys must be applied in like manner. The law in such case makes the appropriation, and it is not at the election of the creditor, even with the concurrence of the other partner, to make any different disposition to the prejudice of the estate of the deceased. As a court of equity will compel this application, when it becomes necessary to invoke its aid, so it will deem the creditor, into whose hands the fund comes with full knowledge, to have done that which he ought to have done, and the joint debts first discharged when the

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fund is sufficient. There is therefore error in the ruling of the court for which there must be a new trial.

The plaintiff testifies that the \$4,000 debt is constituted in part of debts of the firm, and if so, this part is equally entitled to share in the distribution of the fund received by the plaintiff, and perhaps has a preferential claim to the appropriation over the \$1,000 debt. To ascertain this a reference may become necessary, and can be better taken in the court below.

Let the judgment be reversed to the end that a new trial be had, and let this be certified.

Error.

Venire de novo.

N. R. JONES, Sheriff, v. SAMUEL P. ARRINGTON.

"Back-Taxes"—Relief of Sheriff—Legislative Power.

It is competent for the legislature to empower sheriffs to collect "back-taxes;" and where, as here, the sheriff has himself made a full settlement and gone out of office, the delinquent tax payer's liability to him is not thereby extinguished. *Taylor v. Allen*, 67 N. C., 346, commented on.

(*Railroad v. Com'rs of Alamance*, 82 N. C., 259; *Morton v. Ashbee*, 1 Jones, 312; *Whitehurst v. Dey*, 90 N. C., 542; *Hinton v. Hinton*, Phil., 410; *Taylor v. Allen*, 67 N. C., 346, cited.)

CIVIL ACTION, tried at Fall Term, 1884, of WARREN Superior Court, before *Gudger, J.*

This action was brought for the collection of taxes alleged to be due the plaintiff from the defendant for the years 1873 and 1880 inclusive, under the act of 1883, ch. 79, entitled "an act for the relief of Nathaniel R. Jones, former sheriff of Warren county." The facts material to an un-

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derstanding of the point decided are stated in the opinion. The plaintiff appealed.

Messrs. W. A. Montgomery and Battle & Mordecai, for plaintiff.
Mr. Joseph B. Batchelor, for defendant.

SMITH, C. J. The plaintiff had filled the successive terms of the office of sheriff of Warren county from the year 1873 until the first Monday in September, 1881, when his last term expired, and had during this period regularly accounted for and paid over to the proper authorities the taxes, state and county, with the collection of which he was charged. For his relief at the session of the general assembly, held in the year 1883, an act was passed, the first section of which is in these words:

“That Nathaniel R. Jones, former sheriff of Warren county, be, and he is hereby authorized, to collect the arrears of taxes due the said Nathaniel R. Jones for the years 1873 to 1881, (designating the several years in words) and for that purpose he may appoint one or more persons to make said collections, under the same rules and regulations as are prescribed by law for the regular collection of taxes, and the power and authority hereby granted shall cease on the 1st day of January, 1884.”

The next section directs the mode of procedure when the demand against the alleged delinquent tax payer is resisted on the ground that the tax has been paid, and the sheriff's receipt as evidence thereof has been lost, which has been pursued in the present case, while the remaining section extends the provisions of the act over so much of the territory of Warren as formed a part of that collection district, and was detached to make the county of Vance.

Upon the trial in the superior court, to which the cause commencing before a justice of the peace had been removed by appeal, the judge expressed the opinion that the en-

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actment was not warranted by the constitution, and was consequently inoperative, and therefore the plaintiff submitted to a nonsuit and appealed.

We have before us upon the record a single question, and this alone we propose to consider.

Is the act unauthorized by the constitution?

In the case the *N. C. R. R. Company v. Commissioners of Alamance*, 82 N. C., 259, the plaintiff impeached the validity of an enactment which provided for the collection of taxes upon unlisted property liable thereto, for the intervening years between 1869 and 1876 inclusive, as an invasion of vested immunities not authorized by the constitution. In passing upon this contention the court say:

"The retrospective features of the act are not fatal to its validity. It does not undertake to impose new burdens or additional liabilities upon the companies, but to pursue and charge the taxable property which they possessed and which has escaped its share of the common burdens. It seeks nothing more. No vested rights are involved; no wrong done by the means employed to correct a common error, and prevent an unjust and unintended exemption."

Again in *Morton v. Ashbee*, 1 Jones, 312, in reference to an act which authorizes the administrator of a deceased sheriff to proceed with the collection of the arrears of taxes due for the three preceding years, in meeting a similar objection, BATTLE, J., speaking for the court, says: "*We are clear as to the power of the legislature to pass the act in question, and that it gave him the right to collect as general administrator.*"

So in the case first cited the court say in regard to such enactments: "There are numerous instances in our own legislation where the time for the collection of unpaid taxes has been extended to those due for many years previous, for the indemnity and reimbursement of the collecting officer and the sureties on his official bond and their legal repre-

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sentatives, *without question*, so far as we know, as to the incompetency of the legislature to make the enactment."

Our attention was not then called to the case of *Morton v. Ashbee*, *supra*, as containing an actual ruling upon the point.

Numerous special acts for the relief of sheriffs in extending their power, to collect taxes in arrear, will be found in the legislation of 1881 and 1883 and also at each of those sessions a general and comprehensive enactment conferring upon all these officers authority to collect unpaid taxes for which they have accounted in their several settlements. Acts 1881, ch. 93; Acts 1883, ch. 30.

It would thus seem that the possession of the power to remove the obstruction arising from the lapse of time, and again exposing the delinquent tax-payer to the remedies provided for the enforced payment of what is due, has been so long exercised, and promptly vindicated by judicial decision when denied, that it must now be settled beyond the reach of controversy.

The argument for the appellee is that the collector's settlement is an extinction of the tax-payer's liability, prolonged only for one year, and forever gone if not enforced during this period, and beyond the competency of the law-making power to revive. This reasoning is wholly irreconcilable with the adjudications and the practice.

The public taxes, state and county, under the law now in force (Acts 1881, ch. 117), become due and payable, the former on the second Monday in January (section 41), the latter on the first Monday in February (section 45), after the first Monday in September of the preceding year, when the tax list goes into the sheriff's hands for collection (section 24). He, and in case of his death the sureties to his official bond are allowed one year, and no longer, from the day prescribed for his settlement and payment of the state taxes, to finish the collection of all taxes (section 50).

While the time for the settlement has been varied and

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fixed at different periods, in all the revenue legislation, the relations of these provisions, so far as we have examined, remain; and the settlements are required to be made before the time expires in which the officer is allowed to proceed with the collection. Such a provision is found in the revenue legislation in the Revised Statutes, ch. 102, § 44, in the Revised Code, ch. 99, § 84, and in Bat. Rev. ch. 102, § 50, in all of which the officer is allowed a year after settlement to conclude his collection.

Some countenance is afforded to the suggestion that the extension of the time for collection for one year after the officer has made his settlement is in effect a limitation put upon the enforcement of the tax-payer's obligation, and when the time is past that liability cannot be revived by what is said by RODMAN, J., delivering the opinion in *Taylor v. Allen*, 67 N. C., 346.

"If we regard the sheriff's power to sell as a power given on the condition that it be exercised within a certain time, which failed to be acquired by not selling within the time, it would seem clear that the legislature could not by the private act of February, 1861, give the sheriff a power to sell the land of the defendant. It would be to take his property without due process of law. And if we consider the requirement to sell by the first of October as only a statute of limitations, yet, although a legislature may prolong a period of limitation, or suspend the running of the statute before the remedy is wholly barred, it cannot lawfully do so afterwards."

The sheriff's deed was here declared to be ineffectual in passing title to the land, in consequence of his disregard of essential requirements of the law prescribing his course of proceeding, even supposing the power to sell had been prolonged and could be exercised, and hence the remarks we have quoted, made *arguendo*, were not necessary to the decision of the cause. No authority was referred to, nor the

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contrary ruling in *Morton v. Ashbee*, noticed, nor weight given to the frequent instances in which the general assembly have removed the restraint upon the tax collector and enabled him to prosecute his remedy against delinquents, as an interpretation of constitutional power, and we can only allow to the opinion the weight due to the learned judge who expressed it.

But aside from the antagonism of opposing authority, we do not concur in the argument that assimilates the case to an enactment that attempts to revive a demand that has become barred by the statute of limitations, the repugnance of which to the constitution of the United States has been recently declared in *Whitehurst v. Dey*, 90 N. C., 542.

Such an enactment does not operate upon the debt or liability of the tax payer, which remains as before, but is simply a removal of a restriction imposed upon the collector upon grounds of public policy in cases in which it is deemed proper to grant the indulgence. Similar legislation was sustained in *Hinton v. Hinton*, Phil., 410, which extended the time in which a widow was allowed to enter her dissent to the testator's will after the expiration of the six months prescribed by law.

This was more obnoxious retroactive legislation, since it disturbed the legal relations of the widow towards those entitled to the devised estate.

In our case a mere restriction is removed from a public officer so that he may enforce a subsisting, not barred, obligation incurred by the tax payer under the operation of a revenue law.

But whatever force there might be in the argument against the right of the general assembly thus to subject the tax payer to the demands of the collector after the protection afforded under the law, if the question were still open to controversy, we deem it settled by adjudication and prac-

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tice for too long a period for us now to review it and disturb the rulings.

There is error and must be a new trial. It is so adjudged and this will be certified.

Error.

Venire de novo.

 WILLIAM H. HARDY v. THOMAS J. MILES.

Executors and Administrators—Parties.

1. Where an executor dies leaving unadministered assets in his hands, the administrator *de bonis non* of the testator must be made a party to an action against the representative of the deceased executor, in which the next of kin or legatees seek a settlement of the estate.
 2. If such administrator refuse to join as plaintiff, he may be made a party defendant.
- (*University v. Hughes*, 90 N. C., 537; *Ham v. Kornegay*, 85 N. C., 119; *State v. Johnston*, 8 Ired., 397; *Goodman v. Goodman*, 72 N. C., 508; *Murphy v. Harrison*, 65 N. C., 246, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1883, of WARREN Superior Court, before *Shepherd, J.*

This action was brought to vacate a decree, and surcharge and falsify an account, and for the payment of a legacy.

The pleadings show that William Miles died in February, 1869, leaving a last will and testament in which he appointed Samuel Miles executor, empowering him to sell his real estate, and after paying his debts and other expenses, to distribute the surplus among the testator's six children and representatives, of whom the plaintiff is one, being a son of a daughter of the testator, who died in his life time.

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Samuel Miles died intestate sometime in the year 1876, and the defendant Thomas J. Miles was appointed his administrator.

The plaintiff, at the time of the death of the testator, was an infant of tender years and never had a guardian.

The plaintiff charges a fraudulent disposition of the real estate of the testator by the executor Miles, to his own advantage; and that after proceedings had by the executor in the probate court for a final settlement of said estate, while the plaintiff was an infant, to which he alleges he was not a party, the said executor soon after the plaintiff came of age, by fraudulent misrepresentations and concealment, obtained from him a receipt for his share of the estate of his grandfather (the testator William Miles) which did not cover more than a fourth of what was due him upon a fair account by the executor.

The defendant denied any fraud on the part of his intestate (the said executor), and insisted that the plaintiff was estopped by the decree in the case, determined in the probate court, brought by the intestate for a settlement of his testator's estate; and further insisted that the plaintiff's action was barred by the statute of limitations.

Judgment in behalf of plaintiff, from which the defendant appealed.

Mr. W. A. Montgomery, for plaintiff.

Mr. J. B. Batchelor, for defendant.

ASHE, J. In this court the defendant's counsel took exception to the plaintiff's complaint for a defect of parties, alleging that the administrator *de bonis non, cum testamento annexo*, of William Miles was a necessary party to the action.

We think the exception is well taken. William Miles, the testator, died in 1869 and Samuel Miles was his executor, who qualified as such, and took upon himself the burthen

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of executing the will. He died in 1876 and the defendant took out letters of administration on his estate.

It is alleged in the plaintiff's complaint that Samuel Miles, the executor of William Miles, abused his trust and appropriated a large part of the proceeds of the real estate of his testator, which by the will he was directed to sell and distribute among the next of kin of the testator. If that was so, it left that amount in his hands as executor, and his administration of the estate of his testator was incomplete and unfinished at his death, to that extent. In that case, it is well established that no one but an administrator *d. b. n.* of the testator could bring an action against the administrator of the deceased executor. *University v. Hughes*, 90 N. C., 537; *Ham v. Kornegay*, 85 N. C., 119 and the cases there cited.

Besides these, the case of *State, &c., v. Johnston*, 8 Ired., 397, is to the same effect. It was there held, "that when assets have remained in the hands of an administrator for more than seven years unclaimed by the next of kin, and the administrator dies, the trustees of the University cannot recover in their own name from the representative of such administrator. The assets can only be recovered by an administrator *d. b. n.*, who is immediately answerable over to the trustees; provided no claim be set up on the part of the next of kin."

The plaintiff's action cannot be sustained with the present parties. We hold that the administrator *de bonis non, cum testamento annexo*, of William Miles, deceased, is a necessary party.

But, so voluminous is the record in the case, consisting of over a hundred pages of legal-cap paper, showing how elaborately the case has been litigated, to save the parties the repetition of the trouble and vexation they have already encountered, we are of the opinion it is just and proper that the case should be remanded that amendments should be made, so as to make the administrator *d. b. n.* of William

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Miles a party to the action—we would say as plaintiff, if the superior court had the power so to do at this stage of the proceedings; but it has been expressly decided in the case of *Goodman v. Goodman*, 72 N. C., 508, that the superior court has no such power.

But in *Murphy v. Harrison*, 65 N. C., 246, it is held that where the administrator refuses to bring an action to surcharge and falsify an account, by which the estate of his intestate has been injured, the legatees or next of kin may bring the action; but in doing so, they must make the administrator or executor a party defendant. This case would seem to come within the principle decided in that case. There, the administrator refused to act, and he could not be made a party plaintiff without his consent, and yet the plaintiffs, the next of kin, had a right to have the account surcharged and falsified. Here, there is no administrator *d. b. n.* joined in the action, whether because there was none, or, if one, he refused to act, does not appear; but the plaintiff has sustained a wrong which the law would not be true to itself if it did not furnish him a remedy to redress. He not only, as in the *Goodman case*, seeks to surcharge and falsify the account, but to vacate the decree rendered against him in the action in which the account was taken, to which he alleges he was not a party, and also, to set aside a receipt taken by the executor by concealment and false representation. This is a much stronger case for the plaintiff than was the *Goodman case*.

Our conclusion is that the cause should be remanded to the superior court that the administrator *de bonis non, cum testamento annexo* of William Miles if there be one, may be made a party defendant; and if not, that he may be made a party when appointed.

Remanded.

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CHARLES BRADY and wife v. E. S. MANESS and another.

Ejectment—Lappage.

In case of a lappage, and each bargainee is on his own land, outside the interference, the title will be in him who has the elder title; but if the junior bargainee has had actual adverse possession for seven years with color, he acquires a good title to the part so occupied. Here, the defendant having failed to establish such possession, and the jury having found in favor of the plaintiff, the latter is entitled to recover.

EJECTMENT, tried at December Special Term, 1883, of MOORE Superior Court, before *MacRae, J.*

The plaintiffs read in evidence a grant from the state to Joseph Cook, dated December 18, 1797, which covered the land in dispute, and showed a regular chain of title by deed and descent to Elizabeth Moore, the mother of the feme plaintiff, who died intestate.

The defendants, in support of their title, introduced a deed from Malcolm McNeill, sheriff, to Isaac Beason, dated in May 1798, which recited and purported to have been made in pursuance of a sale made by said sheriff on the 19th of September, 1796, and showed a regular chain of title by deeds from said Beason to the defendant, E. S. Maness.

The case states there was evidence tending to prove that defendants' grant and deeds covered the *locus in quo*, but there is no mention of any grant having been offered in evidence by the defendants.

There was no evidence that plaintiffs or those under whom they claim, had ever been in possession of the portion of land in dispute, which is a lappage. And there was conflicting evidence as to whether defendants had been in possession of any portion of the lappage as long as seven years

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before the commencement of this action. There was also conflicting evidence as to whether the defendants had been in possession of a portion of the land sued for, under color of title for more than seven years before suit brought.

The defendants introduced Henry Maness as a witness, who testified that Billy Martindale entered land adjoining the land claimed by the plaintiffs, and gave it to his son, and that he (witness) bought it from Eli Moffitt and Alfred Brower at a trust sale, and sold it to Joe Moore, who lives on it now, and that it lapped over on the Cook land, but how far and at what point the witness did not state; but what he claimed was the lappage of the Beason land on the Cook land; and that was about twenty-five years ago.

Neither the alleged grant nor mesne conveyances were introduced.

It was further in evidence that Joseph J. Moore, a son of Elizabeth Moore, cultivated a small field on one side and inside the lappage for ten years—the witnesses disagreeing as to whether he cultivated it every year or not; and there was no testimony as to how said Moore held possession of the field, or whether it was the clearing made by Henry Maness.

The defendants' counsel requested His Honor on the above state of facts to charge the jury "that the possession of Joseph Moore, holding under Henry Maness, who held under the Martindale grant and a deed by virtue of a sale under a deed of trust to Moffitt and Brower for one hundred acres, part of the Cook land, and now holding under the Cook grant, was adverse to the plaintiffs in this action, who must prove title against the world." The instruction was refused and the defendants excepted.

Verdict and judgment for plaintiffs, and the defendants appealed.

Messrs. J. W. Hinsdale and W. E. Murchison, for plaintiffs.
Messrs. McIver & Black, for defendants.

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ASHE, J. The only question presented by the record for our determination is, whether His Honor in the court below committed an error in refusing to give the charge requested.

The land in dispute is a lappage to which the plaintiffs claim title through a grant from the state, dated in 1797, for the land described in the complaint, which includes the *locus in quo*, and by mesne conveyances and descent to the feme plaintiff.

The defendants claim the land through a sheriff's deed, dated in 1798, and mesne conveyances to the defendant, E. S. Maness.

The title made out by the plaintiffs is indisputable, unless the defendants show that they, or those under whom they claim, have been in the adverse possession of the interference for seven consecutive years with color of title. It is well settled that where two deeds cover in part the same land and each bargainee is settled on his own land, outside of the interference, the title will be in him who has the elder title; but if the junior bargainee has been in the actual possession of the lappage for seven years, he will have thereby acquired a good title to that part by virtue of the statute of limitations.

The defendant Maness contended that he had held adverse possession of the lappage for seven years with color of title, and offered evidence to sustain the position; but it was met by conflicting evidence on the part of the plaintiffs; and this constituted the only real issue which was submitted to the jury.

The defendant contended that even if he should fail to establish the seven years adverse possession of the lappage by himself, or those under whom he claims, still, the plaintiffs could not recover, for that, one Joe Moore had been in possession of the land for more than seven years with color of title, and requested His Honor to charge the jury, "that

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the possession of Moore holding under Henry Maness who held under the Martindale grant and a deed by virtue of a sale under a deed of trust to Moffitt and Brower for one hundred acres, part of the Cook land, and now holding under the Cook grant, was adverse to the plaintiffs, and they must make out a title against the world."

His Honor very properly refused to give the charge; for what difference could it make whether Joe Moore was in possession of any part of the land in dispute, or how long he had held possession, if the defendants were also in possession. Moore is not a party to the action; nor was it shown that he held possession under the defendants. Moore's possession therefore could not prevent the defendants from being trespassers.

Admitting that Moore had held possession of a small field on the interference for ten years without interruption, as contended by the defendants, upon which some doubt however is thrown by the testimony, it could not avail him anything, and much less the defendants, without color of title, and that he did not have; for in the claim set up for him by the defendants under the Martindale entry, there was no grant or deed of any description offered in evidence, that could be construed into a color of title. But even conceding that Moore had possession of the small field described by the witness, on one side of the lappage for twenty-five years, that, without color of title, would only give him a title by presumption of a deed from the plaintiffs, or some one of those under whom they claim, to the extent of his actual possession, that is, up to his enclosure; but that could not prevent the plaintiffs from recovering that portion of the lappage which was outside his enclosure and in possession of the defendants.

The jury having found all the issues upon the question of adverse possession against the defendants, and there being no error in the refusal of His Honor to give the instruc-

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tion asked for by the defendants, the judgment of the court below must be affirmed.

No error.

Affirmed.

O. B. HATHAWAY v. E. D. HATHAWAY and others.

Witness—Transaction with person deceased—Section 590—Wills.

A witness, who is a devisee under a script executed in January, is not competent upon trial of an issue *devisavit vel non*, to speak of conversations with the testator tending to impeach a script executed in May thereafter. As the last may be found to be a revocation of the will previously made, such witness is directly interested in the result of the issue, (THE CODE, § 590,) as to which of the two is the will of the testator.

(*McLeary v. Norment*, 84 N. C., 235, cited and approved.)

SPECIAL PROCEEDING heard at Spring Term, 1884, of PITT Superior Court, before *Shepherd, J.*

This was a proceeding commenced by petition in the probate court, to set aside the probate in common-form of a paper-writing purporting to be the last will and testament of Anna Hathaway, executed on May 8, 1879, and for the probate in solemn-form of her will executed on January 27, 1879.

The following issues were prepared and transferred to the superior court for trial :

1. Is the paper-writing dated and purporting to have been executed on the 8th day of May, 1879, or any part thereof, if so, what part, the last will and testament of the said Anna Hathaway?

2. Is the paper-writing dated and purporting to have been

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executed on the 27th day of January, 1879, or any part thereof, if so, what part, the last will and testament of the said Anna Hathaway?

The jury found the first issue in the affirmative and the second in the negative. The facts in reference to proving the declarations of the testatrix are set out in the opinion here.

There was judgment in favor of the plaintiffs from which the defendants, propounders of the will of January 27th, appealed.

Messrs. Batchelor & Devereux and *Gilliam & Son*, for plaintiff.
No counsel for defendant.

SMITH, C. J. Two scripts bearing the respective dates of January 27th, 1879, and May 8th of the same year, each purporting to be the last will of one Anna Hathaway were offered for probate at the same time by two of the executors of the first, and the sole executor in the last, who is also an executor in the other, but refuses to act with his associates. These are the opposing parties to the twofold contest and *caveat* the scripts. Issues of *devisavit vel non* in respect to both instruments were prepared and submitted to the same jury at the same time.

The propounder of the instrument made in May offered evidence proving the formal execution of that script and desisted. Thereupon the propounders of the script of January introduced one McG. Hopkins who testified to declarations made to him by the testatrix on the day of the date of the last script, tending to show the exercise of undue influence over her mind by the executor therein, the party to whom and his wife the entire estate of the testatrix is given, and that the instrument is not the offspring of her own volition.

After this testimony had been heard, the counsel for the

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propounder of the will thus impeached stated to the court that they had just discovered that the witness was a devisee under the first will, and was incompetent under section 590 of THE CODE, to speak of conversations with the deceased, and moved that all such testimony be withdrawn from the jury. The motion was allowed and the propounders of the first, who were caveators to the last will, excepted.

The jury rendered a verdict in favor of the script of May and against that of January preceding, and from the judgment thereon the said propounders of the first will appealed.

The rejected testimony was not offered to show the want of legal capacity in the deceased to make a disposition of her estate, disclosed by her erratic and unnatural acts and utterances, as indications of the diseased intellect from which they proceed, which, as was held in *McLeary v. Norment*, 84 N. C., 235, are not within the inhibitions of the statute, but to prove facts, as such, asserted by the testatrix whereof her declarations are the only proof

This comes within the words and meaning of the act as frequently heretofore expounded, and the only question is whether the witness is personally disqualified to speak of the declaration. For the appellant it is insisted that he is not, and that he has no interest in the determination of the issue as to the last will, to which his testimony is confined. This is a misconception of the relations of the witness to the controversy. If the last script be the will of the testatrix, as it disposes of all her estate, it is a revocation of all others previously made. It is only by putting it out of the way that the other can be established, though probate of it still becomes necessary. The witness then has a direct interest in defeating the probate of the last script, and thus removing a barrier which so long as it remains is insuperable to the probate of the older script. Indeed the affirmative finding that the script of May is the last will of the testatrix is a disposition of the matter in controversy, and dispenses

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with the necessity of making any response to the issue as to the other.

The interest of the witness was therefore direct and positive, and there was no error in ruling out the testimony.

There is no error and this will be certified to the end that further proceedings be had in the court below.

No error.

Affirmed.

SUSAN KING and others v. ANTHONY DAVIS, Ex'r, and others.

Adoption of Children—Wills—Parent and Child.

1. The provision in Battle's Revisal, ch. 1, § 3, allowing children to be adopted and to inherit as children born in wedlock, only has reference to cases of the intestacy of the person standing *in loco parentis*.
2. Where, prior to the issuing of such letters of adoption, the party adopting made his will bequeathing certain property to the child afterwards adopted; *Held* that such bequest takes the case out of the statute providing for after-born children. Rev. Code, ch. 119, § 29.
3. If any provision is made for an after-born child, the court cannot say that it is inadequate. The statute only applies when no provision at all has been made.
4. Whether the adoption creates the parental relation only from the date of the order, or whether the statute is retroactive and establishes the relation of parent and child from the birth of the child—*quære*.

(*Meares v. Meares*, 4 Ired., 192, cited and approved.)

SPECIAL PROCEEDING for an account, &c., commenced before the clerk, and heard at Spring Term, 1884, of LENOIR Superior Court, before *Shepherd, J.*

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Richard W. King died on March 7th, 1883, leaving a will bearing date in August, 1880, with a codicil annexed made on October 27th, 1881, which have been duly proved as such, and letters testamentary issued to the defendant, Anthony Davis, the sole surviving executor therein named. In the 11th clause of the will the testator, to the defendant Richard Taylor, then an infant and illegitimate child of one Mary E. Taylor, devises a tract of land consisting of 240 acres, more or less, for life, and if he die leaving heirs of his body him surviving, the remainder to them in fee; and if none such, then to the children of Mary Ann Hunter and Sophia C. West.

In the next clause he gives to his executor, Anthony Davis, in trust for said Richard Taylor, the sum of \$500 to be used in his education and the residue not expended to be paid over to him on his attaining the age of twenty-one years, with limitations over similar to those connected with the devise, should he die before reaching majority and leave no heirs of his body.

On the 25th day of October, 1882, application was made by said Richard W. King, the said Mary E. Taylor the mother, and the said Richard Taylor, under the act of March 3rd, 1873, Bat. Rev., ch. 1, for the adoption of the said infant by the said Richard W. King for the life of said Richard Taylor, and judgment was accordingly so rendered in favor of the petitioner in form as follows:

“Upon reading the foregoing petition, the court doth declare that the facts set forth in the said petition are true, and it is therefore decreed that the name of the said Richard Taylor be, and the same is hereby changed to Richard King.

And it further appearing that the said Richard W. King is a proper and suitable person, the adoption prayed for in said petition is hereby sanctioned and allowed, and it is

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ordereb that letters of adoption of the said Richard Taylor be granted and issued to the said Richard W. King, and that the said Richard Taylor be, and is hereby declared to be the legitimate child of the said Richard W. King, in pursuance of sections 7 and 8 of chapter 9 of Rattle's Revisal, and this order shall have the effect forthwith to establish the relations of parent and child between the said Richard W. King and the said Richard Taylor for the life of the said Richard Taylor with all the duties, powers and rights belonging to the actual relationship of parent and child, and should said Richard W. King die intestate, said Richard Taylor shall inherit the real estate and be entitled to the personal estate of the said Richard W. King in the same manner and to the same extent, said Richard Taylor would be entitled to, if he had been the actual lawful child of the said Richard W. King.

It is further ordered that this order be recorded in the office of the clerk of the superior court of Lenoir county aforesaid, this 25th day of October, 1882.

W. W. N. HUNTER,
Superior Court Clerk."

This judgment rendered by the clerk was submitted to the judge and endorsed with his approval.

It embodies the provisions of the statute in declaring the legal effect of the adoption as set out more especially in the sections referred to in the decree.

In the Revised Code, ch. 119, § 29, it is provided that: "Children born after the making of their parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and portion of said parent's estate, as if he or she had died intestate."

The present suit, at the instance of the other legatees, is instituted against the executor and the said Richard Taylor, or King as his name now is, for a general settlement of the

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testator's estate and the payment of the legacies, there being no debts of the estate to be paid and no necessity for the retention of the funds in the hands of the executor.

The executor submits to an account while the defendant Richard represented by his guardian, insists that he is entitled to the entire estate, real and personal, except the portion to which the widow of the testator is entitled, and this by virtue of the statute last referred to, and his adoption after the making of the will, placing him in the same relation towards the testator as an after-born child would be, the birth and adoption being equivalent in their legal consequences.

The clerk rejected this claim and adjudged that the said Richard could only claim the property given him in the will, and upon appeal this ruling was affirmed by the judge who rendered judgment that the executor pay over and deliver to the plaintiffs or to the guardian of such as are infants, the legacies bequeathed to them in the will. From this judgment, the defendant Richard appeals to this court.

Mr. George Davis, for plaintiff.

Messrs. Strong & Smedes and John Devereux, for defendant.

SMITH, C. J., after stating the above. The sole question before us, and the only one discussed in the opposing contentions of counsel is, whether the adoption has the effect ascribed to it, and if so, whether the said Richard Taylor or King, can treat, as a nullity, the devise and bequest made to him, while illegitimate, and bring himself within the scope of the statute as if he were an after-born legitimate child of the testator, unprovided for.

The statute which authorises the proceeding for the legitimation of children born and begotten out of wedlock, by the putative parent, establishes their personal relations and con-

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fers a capacity to inherit and share in the distribution of the personal estate, and this is in the form of the decree.

It declares such adoption, when for life, shall have the effect "if the petitioner die intestate, to enable such child to inherit the real estate and entitle it to the personal estate," as if such child had been legitimate at its birth. Section 3 of ch. 1.

Language almost identical is employed in chapter 9, section 8, in describing the consequences of legitimization.

It shall "impose upon the father all the obligations which fathers owe to their lawful children," and it shall enable the child to inherit from the father only his real estate, and also "entitle such child to the personal estate of his father" in the same manner as if such child "had been born in lawful wedlock."

These provisions obviously look to an intestacy, and have no reference to cases in which property is disposed of by will.

But the appellant invokes the aid of the statute which admits to a share of the testator's estate an after-born child who has not been provided for in the will, treating adoption as a legal birth, and rejecting the gifts in the will because they are bestowed on a *stranger* and not on the testator's own offspring, and hence it is urged they are not a *provision for a child*.

The argument is unsubstantial, and we cannot give it our approval. The devise and bequest are personal to the infant, and are no less his because of his adoption and change of name. His identity remains, and he may claim the land and money just as much as if the action in regard to his adoption had not taken place. He is not therefore in the condition of a child unprovided for, and, if permitted to claim under this enactment, he would occupy a better position than a lawful after-born child, since he could thus take the benefit of the provision in the will on his be-

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half and share also in the rest of the estate. Neither is this a case of election, since, if provided for at all, he is excluded from the rest of the testator's estate. It savors of refinement to say that, *as legitimate*, he sets aside the will *pro tanto*, and, *as illegitimate*, he accepts what is given to him in it, thus presenting himself in a double aspect towards the estate.

Again, the argument is pressed that the "provision" was intended to be substantial and bear some proportion to the value of the estate, and not as in this case, the testator's estate being large and valuable, illusory merely.

We cannot undertake, when any provision is made, to say that it is inadequate, since of this the testator must be the judge, and the statute comes in only when no provision at all has been made.

This construction is put upon the statute in *Meares v. Meares*, 4 Ired., 192, cited by counsel, in which RUFFIN, C. J., says: "The statute only provides for a case where the parent dies without having made provision for the child; which means, without having made *any provision*. For the act does not mean to judge between the parent and child as to the adequacy of the provision he may choose to make; but only to supply his accidental omission to make any, and, in doing that, the rules of the statute of distributions and descents are adopted, because there is no other.

It may be further observed that the testator, having made his will, chose to let it remain as it was previous to the adoption of his natural as his lawful son, while, if disposed, he would at any time have made alterations and more liberal provisions for the beneficiary, but he has seen fit to let it speak his intentions concerning the disposal of his large estate down to his death, and so it must stand and be administered in the form in which it came from his hands.

We have avoided the expression of an opinion as to the effect of legitimation, whether as operating on the parental

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relation thereafter, or as producing the same effect upon the infant's status as if he had been born in wedlock, the statute operating retrospectively also; because the decision of the point is not necessary in passing upon the matter presented in the appeal.

The counsel have been able to furnish us with no adjudication, nor have we been able to find one bearing upon the point discussed, and we have without such aid placed what seems to us a fair and reasonable construction upon the statute.

There is no error, and as the details of the account which it may become necessary to state in the distribution of the estate in the executor's hands can be more conveniently managed in the court below, the cause will be remanded, and it is so ordered.

No error.

Affirmed and remanded.

M. K. GRANTHAM and others v. J. B. KENNEDY and wife and others.

Equity, relief by—Judgment—Estoppel—Married Women—Infants.

1. A court of equitable jurisdiction, in proceedings to review judgments at law or final decrees in equity, does not proceed upon the ground that they are erroneous, either in fact or in law, but simply where they are unconscientious and their enforcement would be a fraud.
2. A judgment obtained by fraud is not, strictly speaking, the judgment of the court.
3. Reasonable diligence and good faith are required in applications for relief in such proceedings, and it will not be granted if material matters were omitted from the former case, which were

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known or might by reasonable diligence have been known at the time of the trial.

4. Married women and infants are estopped by judgments, in actions to which they are proper parties, in the same manner as persons *sui juris*.
 5. Where a record is informal and embodied in the minutes of the court, but from the minutes a formal record can be drawn, it is sufficient for the purposes of estoppel.
 6. Where, in 1865, land was divided under regular proceedings for that purpose, to which the plaintiffs and defendant in this action were parties, and each was put into possession of the share allotted to him, and it was afterwards attempted to set aside such proceedings on the ground that the present defendant was not a tenant in common when the proceedings were had; *It was held*, that as no fraud was alleged in the partition proceedings, and as the facts now alleged should have been then known, the plaintiffs are estopped, and equity will not aid them, although some of the present plaintiffs, at the time of such partition, were infants, and some were *femes covert*.
- (*Woodfin v. Smith*, 1 Dev. & Bat. Eq., 451; *Dudley v. Cole*, *Ib.*, 429; *Bissell v. Bozman*, 2 Dev. Eq., 154; *Radcliff v. Alpress*, 3 Ired. Eq., 556; *Pemberton v. Kirk*, 4 Ired. Eq., 178; *Dearer v. Erwin*, 7 Ired. Eq., 250; *Stewart v. Mizell*, 8 Ired. Eq., 242; *Kincade v. Conley*, 64 N. C., 387; *Irey v. McKinnon*, 84 N. C., 651; *Mills v. Witherington*, 2 Dev. & Bat., 433; *Gay v. Stancell*, 76 N. C., 369; *Deloach v. Worke*, 3 Hawks, 36; *Green v. Branton*, 1 Dev. Eq., 500; *Vick v. Pope*, 81 N. C., 22; *Capehart v. Mhoon*, 5 Jones Eq., 197, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1883, of JOHNSTON Superior Court, before *McKoy, J.*

The action was brought to set aside a decree of the late court of pleas and quarter sessions, upon the ground of mistake alleged to have occurred in a proceeding for the division of certain land between the parties as tenants in common.

The case agreed states that one Young Bridgers died intestate in 1844, seized of the land described in the pleadings, and leaving as his heirs-at-law the following named children:

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Caroline, who married the plaintiff Grantham while she was under twenty-one years of age; Laura, who married the plaintiff Bellenger while under said age, and died since this suit was brought, and whose heirs-at-law have been made parties plaintiff; Newitt Bridgers and George Bridgers, both of whom died intestate in 1864 without issue, and leaving their sisters, Caroline and Laura their heirs-at-law, who were of the whole blood, and Helen Kennedy (then Irby) of the half blood on the maternal side.

After Young Bridgers' death, his widow took dower in the land and sold her interest in the same to one Lindsay, who sold to the plaintiff Grantham. About eighty-four acres of the land in controversy were included in said dower, and about forty acres thereof were not covered by the dower.

The lands of the deceased were divided by petition in the late county court among his children, to-wit, the plaintiffs Caroline and Laura, and the said Newitt and George, by setting apart the shares of said Caroline and Laura.

At August term, 1865, of the court of pleas and quarter sessions, a petition *ex parte* was filed in the names of the plaintiffs Grantham and wife, and Bellenger and wife, and Helen Irby (now Kennedy and a defendant in this suit) by her guardian *ad litem*, P. T. Massey, for partition of the lands of said Newitt and George Bridgers. The said Caroline was over, and Laura was under the age of twenty-one years when the petition was filed and the decrees made in the case, allotting to the petitioners their several shares in said lands; and the portion set apart to said Helen in the land now in controversy, it being alleged that Helen was not of the blood of the said Young Bridgers.

The case further states that the plaintiffs were not advised of the mistake and error in the division of the land until September, 1880, and did not, prior to that time, set up any claim to the share which had been allotted to the defendant Helen.

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The facts relating to a sale of the land under a mortgage and the rights of the purchaser, are not necessary to an understanding of the point decided in the opinion, and are therefore omitted.

The court below gave judgment for the defendants, and the plaintiffs appealed.

Mr. W. T. Dortch, for plaintiffs.

Messrs. E. W. Pou and F. H. Busbee, for defendants.

MERRIMON, J. After parties have litigated their alleged rights, and these have been settled and established by decrees and judgments in the course of judicial procedure, and the time has passed by within which such decrees and judgments may ordinarily be reviewed and corrected, either in the court making them or in the appellate court, courts are very reluctant to disturb them. This is necessarily so. Otherwise, there would be no end to litigating the same matter. It might be renewed as often as the caprice or advantage, however attained, of a party might suggest. Confidence in judicial proceedings would be destroyed. No one could be sure that his rights were settled and secure, or that a purchase at a judicial sale would be upheld, and there would be a constant tendency to tamper with and corrupt the administration of public justice. If courts may, at will, temporize and vacillate in deciding cases that come before them; if they may decide them one way this year, and rehear and decide them another way the next; or after the lapse of years, because of some new views of the law involved, or another state of facts that the parties might have established in the first trial and did not, they would certainly become corrupt and contemptible, and an intolerable public evil. A greater calamity could scarcely happen to society.

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It is a fundamental principle in the law, that there shall be an end to every litigation, and when that end is honestly and fairly reached, it should never afterwards be interfered with, even though the court erred as to the law, or the parties failed to produce all the evidence attainable at the time of the trial. The law gives every litigant his day in court, fair and impartial opportunity to be heard both as to the law and the facts of his case; and it as certainly implies that when he has thus been heard and judgment is entered, this shall be the end of the matter. The rights of the parties to the litigation, the rights of all persons claiming and taking benefit directly or indirectly under it, the integrity and stability of judicial proceedings, the good order of society, and the general purpose and spirit of government, alike require that rights once honestly and fairly settled by a judicial proceeding according to the course of the law, shall never afterwards be disturbed.

Hence courts of equity in this country and England have refused aid in all cases where their action would be tantamount to the exercise of appellate jurisdiction, or granting a second opportunity to present a case upon its merits, whether as to law or facts. Such a court will never set aside or enjoin the enforcement of a judgment on the ground of error or mistake in the judgment of a court of law. Other grounds must be assigned than error of law. All errors of decision and procedure must be settled in the tribunal in which they originated, or by some appellate tribunal. It is not the purpose of courts of equity, or courts having equitable jurisdiction, to correct the errors or reverse the judgments of courts of law, or to enable a party to get two trials, each under different forms of procedure.

It is not meant by this that in no case will a decree or judgment entered according to the forms of law be set aside, declared invalid, annulled or enjoined. On the contrary, a court of equity will take jurisdiction in many cases and

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grant such relief. It will protect a party against an unconscientious advantage secured by his adversary through his own fraud, or fraudulent surprise, or because of some unavoidable accident or like mistake of his own. If it clearly appears in an action brought for the purpose of setting aside, or nullifying a decree, or enjoining the enforcement of a judgment, that it is iniquitous and against conscience to enforce it, because the party injured failed to make proper proofs, or to avail himself of a good and just defence as he might and would have made but for the fraud of the adverse party, or surprise occasioned by him, or because of some accident or mistake on his part unattended with any fault or negligence on his part, relief will be granted. It must appear, however, that the party complaining was not negligent, but exercised reasonable diligence in prosecuting, or defending the action (as was his duty) in which the decree or judgment complained of was given. Hence in *Woodfin v. Smith*, 1 Dev. & Bat. Eq., 451, it was held, that a court of equity would not enjoin the collection of an execution because the defendant at law had paid it, when he might have proved that fact on the trial in the action in which the execution was issued, and was not by fraud or surprise prevented from doing so.

Relief will not be granted if matters material were known, or might by reasonable diligence have been known at the time of the trial. Equitable relief will not be granted to a party against a judgment, because of a good ground of defence, of which he was ignorant until after the judgment was given against him, unless he shows that by the exercise of reasonable diligence he could not have discovered it in time for the trial, or that he was prevented from the exercise of such diligence by fraud or surprise on the part of the opposing party, or by accident or mistake, unmixed with negligence on his part. Fraud, or fraudulent surprise, vitiates the judgment, as it does every-

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thing into which it enters. In *Dudley v. Cole*, 1 Dev. & Bat. Eq., 429, Chief Justice RUFFIN said: "We assume that the judgment is right, so far as respects the action of the legal tribunals themselves; and if that were not so, this court will not undertake to revise them for the purpose of correcting either mistake of fact or error in law. But when the party practices a deception upon the court of law, and thereby precludes the opposite party from all defence: when, by means thereof, he gets a judgment for a sum of money, of which no part is due; and then further by concealment and falsehood defeats every fair effort made by the ordinary legal means for re-examining his judgment, a court of equity will restrain such party from the unconscientious use of legal advantage thus fraudulently obtained, and thus fraudulently kept up." In truth, a judgment infected with fraud is in no just sense the judgment of the law, and when such fraud is made to appear, a court of equity upon application will not allow it to be enforced. The law abhors fraud, and defeats and thwarts its purposes through equitable jurisdiction.

It must be added, that reasonable diligence and good faith in applying for equitable relief are essential in all cases. In writing on this subject Mr. SPENCE says: "Negligence or delay in this, as in every other instance in which the court of chancery is called upon to interfere, may extinguish or defeat the best founded claim. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence, but where these are wanting, the court is passive and does nothing." 2 Spence's Eq., Jur. 60.

In support of what we have here said, we cite *Bissell v. Bozman*, 2 Dev. Eq., 154; *Radcliff v. Alpress*, 3 Ired. Eq., 556; *Pemberton v. Kirk*, 4 Ired., Eq., 178; *Deaver v. Erwin*, 7 Ired. Eq., 250; *Stewart v. Mizell*, 8 Ired. Eq., 242; *Kincade v. Conley*, 64 N. C., 387; *Ivey v. McKinnon*, 84 N. C., 651; *Freeman on*

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Judg., § 485, *et seq.*, and cases there cited; Adams Eq., 794; Story Eq., Pl. § 426; Story Eq., Jur., §§ 529, 1521, *et seq.*

Now, applying these principles of law to the case before us, it is very clear, that the action cannot be sustained.

At August term, 1865, of the court of pleas or quarter sessions of Johnston county, the plaintiffs and the defendant Helen Kennedy, then Helen Irby, and an infant suing by her next friend, P. T. Massey, filed their *ex parte* petition in that court, alleging that they were tenants in common of the land specified in the petition, and praying the court to order and direct partition thereof among them; an order appointing commissioners for that purpose was duly entered, the commissioners partitioned the land, allotting one part to the defendant Helen, and made a report of their action to the court, and this report was duly confirmed, and all proper orders and decrees were made in that respect.

The decree in the partition proceedings mentioned, is conclusive upon all parties to it, and it estops the plaintiffs in this action to deny the title of the defendant Helen Kennedy to that part of the land allotted to her, if the said proceedings are valid. *Mills v. Witherington*, 2 Dev. & Bat., 433; *Stewart v. Mizell*, *supra*; *Gay v. Stancell*, 76 N. C., 369.

The objection that the record of the court in the proceedings mentioned are indefinite, loose, informal and imperfect, cannot be sustained. Upon examination, we find the record is informal and embodied in the *minutes* of the court, but it contains all that is essential, and from it, if need be, the formal record could be easily drawn out. It is fuller in setting forth what the court did than is common in like cases. It is seldom, that the records are drawn out in formal order; they are kept in the minutes of proceedings of the court, and when these contain what is essential they are upheld as the record. *Deloach v. Worke*, 3 Hawks, 36.

It was insisted in the argument, that the *femes* plaintiff, were both married, and each was an infant at the time of

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her marriage, and one of them was an infant as well as married, at the time of the proceedings for partition of the lands mentioned. It is settled, that nevertheless, each of them is concluded by the decree and estopped by it to deny the defendant Helen's right to the land allotted to her. Married women whose husbands are parties with them are as much bound by decrees and judgments to which they are parties, as persons *sui juris*, unless the judgment was allowed by the fraud of the husband and combination with another. The husband is presumed to care for and protect the interests of the wife, whether she be of full age or not. She would not be bound by the fraudulent action or connivance of the husband. There is, however, no suggestion of any such fraud in this case. *Green v. Branton*, 1 Dev. Eq., 500; *Vick v. Pope*, 81 N. C., 22.

It is stated in the case agreed, that the defendant Helen was not of the blood of Young Bridgers, the ancestor, from whom the land descended through two of his sons to the *femes* plaintiff, their sisters of the whole blood, but was the only daughter of the widow of the said Young Bridgers, and mother of the *femes* plaintiff, by a second marriage with one Irby. It is further stated, that the plaintiffs were not advised of the *mistake and error*, in alleging in the petition for partition that the defendant Helen was a tenant in common with the *femes* plaintiff of the land, until September, 1880, and did not until that time lay any claim to the share of the land allotted to her.

It is not denied, however, that the *femes* plaintiff knew of the exact relationship existing between themselves and the defendant Helen, or that their husbands knew of it before, at the time and ever since the petition for partition was filed in the court. There was no mistake of fact on the part of any one of the parties to the proceeding, nor was there any fraud or bad faith on the part of the defendant Helen, nor did she occasion any surprise or mistake in any

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respect. She was then an infant, and took only what the plaintiffs admitted of record she was entitled to have, and what the court decreed to her at their suggestion, and with their consent.

So that, the plaintiffs simply misapprehended the legal rights of the *femes* plaintiff as the heirs at law of their deceased brothers. They allege, that they thought their half sister shared with them as such heirs at law.

It may be said, that ignorance of the law does not afford ground for relief, as sought in this action. *Ignorantia legis neminem excusat*. But if it be granted that it could in this or any like case, the plaintiffs do not pretend that they were misled in any respect; there was no fraud on the part of the defendant Helen; there was no mistake of fact, nor was there surprise. It is not alleged that the plaintiffs were ignorant of the state of the law, at the time of the partition or that they consulted counsel and were by him misled. The statute regulating descents in such cases was plain. And besides, this court had repeatedly construed it at the time the petition for partition was filed. The plaintiffs have neglected for fifteen years to take legal advice, and how at last they came to learn that they had misapprehended the law, does not appear. The rights of third parties in the meantime have supervened. The plaintiffs were neither circumspect, vigilant nor diligent, and in no aspect of the case, is any ground for interference with the decree confirming the report of partition presented. *Capehart v. Mhoon*, 5 Jones' Eq., 178; Story's Eq., Jur., § 111, *et seq.*

What we have said disposes of the action, and we need not consider other exceptions incidental to the main one upon which we have passed. Judgment affirmed.

No error.

Affirmed.

BARBEE v. GREEN.

P. B. BARBEE, Adm'r, v. CALVIN J. GREEN.

*Appeal, motion to dismiss—Rules of Supreme Court,
observance of.*

A motion to dismiss an appeal, upon the ground that the appellant did not cause the same to be docketed in accordance with Rule 2, will not be granted, where it appears that the appellee has also failed to comply with its requirements. One who seeks benefit under the Rule must himself observe it.

MOTION to dismiss an appeal heard at October Term, 1884,
of THE SUPREME COURT.

Messrs. Lewis & Son, for plaintiff appellee.

Messrs. Battle & Mordecai, for defendant appellant.

MERRIMON, J. The appeal was taken in this action at the last term of the superior court of Wake county, which was held in the month of August last. The transcript of the record was not filed and the appeal docketed in this court, until the 18th of October, more than eight days after the present term began, and after the court had begun the call of the cases from the judicial district to which the case belongs.

The appellee moved to dismiss the appeal, because the appellant failed to docket the same within the time above indicated in accordance with paragraph six of Rule 2.

It is clear, that the motion cannot be sustained, because, although the appellant did not comply with the *rule* in respect to docketing appeals, as regularly as he ought to have done, the appellee did not proceed as the *rule* allowed him to do in such a case.

If the appellant failed to bring up a transcript of the record and docket the appeal before the call of the causes

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from the district to which it belonged *was concluded*, during the week set apart to that district at the term of this court to which the appeal was taken, *then* the appellee, on exhibiting a certified transcript of the record, or the certificate of the clerk, as required by paragraph seven Rule 2, and filing the same, may move to have the appeal docketed and dismissed at the appellant's costs. Rule 2, par. 7, (89 N. C., 598).

This the appellee did not do. He did not exhibit a transcript of the record, or the certificate of the clerk as required. He waited until the appellant docketed his appeal and then moved to dismiss it. This he could not do, because the rule does not provide for, or authorize such motion, and it is only by virtue of the rule that a motion to dismiss could be sustained for the causes mentioned. The appellant did not comply with the rule, nor did the appellee in his motion to dismiss. Whoever would avail himself of the benefits of the rule must observe its requirements, and place himself within its purpose and scope.

Motion denied.

*W. T. JOHNSON and others v. JOSEPH P. PRAIRIE.

Trusts and Trustees—Equitable Title in Ejectment—Agency, evidence in.

1. Where a deed is made to a trustee conveying land in trust for a married woman, the legal and equitable title will at her death descend to her heirs, since the trustee is no longer necessary, and

*Mr. Justice MERRIMON having been of counsel did not sit on the hearing of this case.

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they have the right to recover the land where they are out of possession at her death, if their estate has not been divested by some superior title.

2. The assignee of a trustee having the legal title, not required for the purposes of the trust, cannot recover the possession from the owner of the equitable title.
 3. Where a purchaser, in the necessary deduction of his title, must use a deed which leads to a fact, showing an equitable title in another, he will be affected with notice of that fact.
 4. The only effect the transfer by a trustee of the legal estate has on the *cestui que trust* is, that it puts the grantee in an adversary position, and the *cestui que trust* must enforce his right before the statute bars.
 5. Declarations of a principal, made after the completion of an act performed by an agent, are not competent to show that the agent had authority to perform such act.
 6. Although such evidence was directed to the judge, in order that he might find the preliminary fact that there was *prima facie* evidence of an agency, yet, if improperly received, a new trial will be awarded.
- (*Jasper v. Maxwell*, 1 Dev. Eq., 357; *Turnage v. Green*, 2 Jones Eq., 63; *Matthews v. McPherson*, 65 N. C., 189; *Stith v. Lookabill*, 76 N. C., 465; *Thompson v. Blair*, 3 Mur., 583; *McRee v. Alexander*, 1 Dev., 321; *Caldwell v. Black*, 5 Ired., 463; *Leggett v. Coffield*, 5 Jones Eq., 383; *Williams v. Williams*, 6 Ired., 281; *Monroe v. Stutts*, 9 Ired., 49; *Grandy v. Ferebee*, 68 N. C., 356; *Francis v. Edwards*, 77 N. C., 271, cited and approved.)

EJECTMENT, tried at Fall Term, 1884, of WAKE Superior court, before *Gudger, J.*

Verdict and judgment for defendapt, and the plaintiffs appealed.

Messrs. T. C. Fuller, E. C. Smith and Lewis & Son, for plaintiffs.

Messrs. D. G. Fowle and G. H. Snow, for defendant.

SMITH, C. J. The land claimed by the contesting parties to this action was devised in 1824 by Moses Mordecai to

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Henry Mordecai, under whom both derive title. The devisee, Henry Mordecai, executed a deed in December, 1854, conveying the land to Henry Miller in trust for the sole and separate use of Sarah Johnson, free from the control or liability for the debts of Wiley Johnson, her husband, and subject to her disposal by writing under seal, and attested by two witnesses directing to whom the trustee shall make title.

The plaintiffs, some of whom were under age at the time of bringing the action on March 15th, 1878, are the heirs-at-law of the said Wiley Johnson and his wife, of whom the latter died in June, 1863, and the former in August of the next year. This is the claim of title set up by the plaintiffs.

The answer of the defendant controverts the allegations of title in the plaintiffs, without averring any in himself, but upon the trial of the issue of ownership in the plaintiffs, upon which an adverse verdict was rendered, he claimed title to the premises derived from the same original source and through two distinct and separate channels.

In support of his claim, he read in evidence a deed from Henry Miller, the trustee, made on July 29th, 1859, to one Henry Jordan, conveying the land without the direction or assent of the said Sarah Johnson, and a deed from Henry Jordan to the defendant for the same, dated on December 19th, 1872.

He also produced in evidence a deed for the premises, executed December 14th, 1872, by John Bunting to the defendant, the bearing of which upon the issue is not stated and does not appear.

To show a paramount equitable title transmitted from Henry Mordecai through another channel to himself, the defendant offered evidence to show a contract in writing (of which the original being lost parol proof was received) entered into between the said Henry Mordecai, through the

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agency of George Mordecai representing him, and John Taylor, on or about November 11th, 1854, at which time the latter was put into possession by Wiley Johnson, and this possession was continued to 1872 or 1873. He then put in evidence a deed of mortgage for the land made May 22nd, 1858, from Taylor to Henry Jordan, and a subsequent assignment to him of the equity of redemption.

Another deed was exhibited from Miller, trustee, and Sarah Johnson, the *cestui que trust* to George Taylor, dated May 11th, 1857, conveying the portion of the land described in the deed from Henry Mordecai to the former, but embracing no part of that in controversy, in which one of the boundaries is described as running "to John Taylor's corner, thence along John Taylor's line to the Tarboro road." This is offered as a recognition of the superior right of Taylor under his contract with the said Henry Mordecai.

It is plain that the full equitable estate, of which the trustee held a mere legal title for its protection, no longer necessary after the death of the said Sarah Johnson, descended to the plaintiffs, and, as possession is not needed in executing the trust, they have a right to recover the possession unless their estate has been in some way divested, or a superior equitable title was acquired by Taylor under his alleged contract of purchase. *Jasper v. Maxwell*, 1 Dev. Eq., 357; *Turnage v. Green*, 2 Jones Eq., 63; *Matthews v. McPherson*, 65 N. C., 189.

The assignee of a trustee having the legal title not required for the purposes of the trust cannot recover possession from the owner of the equitable estate. *Slith v. Lookabill* 76 N. C., 465.

The deed from Miller, made in disregard of the declared trusts, could have no other effect than to transfer the legal estate with those adhering trusts, which could be enforced against the grantee, Henry Jordan. Nor does the latter take the legal estate disencumbered of the trusts as a pur-

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chaser for value without notice, for he has notice of the provisions of the deed conveying the land to his grantor the trustee.

The rule is thus laid down by Chief Justice TAYLOR in *Thompson v. Blair*, 3 Murph., 583:

"It is a well settled rule in this court, that where a purchaser, in the necessary deduction of his title, must use a deed which leads to a fact showing an equitable title in another, he will be affected with notice of that fact."

The only prejudicial result produced by the transfer of the legal estate may be to put the grantee in adversary relations towards the *cestuis que trust*, and force them to pursue and charge it within a limited time. But as the statute of limitations, in analogy to which a court of equity proceeds in administering relief, was suspended until the 1st day of January, 1870, and longer by reason of the supervening disability of infancy as to some of the plaintiffs, these latter do not encounter this obstruction. The running of the statute against a part of the plaintiffs who, as adults, have slumbered upon their rights, will not prevent the enforcement of the rights of such of the co-tenants as were under disability up to the period after which a limited time was allowed in which to bring their suit. *McRee v. Alexander*, 1 Dev., 321; *Caldwell v. Black*, 5 Ired., 463.

No legal estate has therefore been acquired that can be set up in bar of the claim of the infant plaintiffs to recover possession as against a subsequent trustee. *Leggett v. Coffield*, 5 Jones Eq., 382.

The defendant also deduces an equitable title to the land under the contract alleged to have been made with Taylor by Henry Mordecai, before the execution of his deed to Miller, supported by a continuous and uninterrupted possession in Taylor, thence until 1872, and thereafter in the defendant under Jordan's deed to him. If the existence of this contract be shown, and authority in George Mordecai

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to make it and bind the said Henry Mordecai, this title is paramount and must prevail against the plaintiffs and defeat their action.

It thus becomes necessary to inquire into the competency of evidence offered and admitted after objection from the plaintiffs, to show the authority conferred upon the alleged agent, George Mordecai, to make the contract of sale.

To show such agency the defendant was allowed to prove the declarations of Henry Mordecai, made to the witness in 1872, "to the effect that George Mordecai acted as his agent in the sale of the same lands," of which that in dispute forms a part.

This declaration, made in 1872, is received as evidence of an agency exercised in 1854, eighteen years previous to entering into a contract binding upon the principal; in other words, to prove a pre-existing authority, not to confer it. The evidence is narrative of a past transaction or fact, and is offered to establish it, and can no more be competent for such purpose than if proceeding from any one else. Henry Mordecai must by words or acts constitute an agency, and then they have a substantive operation in creating it, but the declaration of what had been done in the past cannot be accepted as evidence of it. It is but hearsay.

It is true the court must first have sufficient evidence of an agency to permit the acts of an agent to go to the jury as acts of the principal, and then both the agency and what was said or done in its exercise must go to the jury to be passed on by them. The cases to this effect are numerous, and we cite only a few. *Williams v. Williams*, 6 Ired., 281; *Monroe v. Stults*, 9 Ired., 49; *Grandy v. Ferebee*, 68 N. C., 356; *Francis v. Edwards*, 77 N. C., 271.

But while the court must first find that there is *prima facie* evidence of the agency, the same evidence goes to the jury, and being material, its admission involves error.

There was other evidence bearing upon the same point,

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but, as it stood confronting the fact that a little more than a year after the date of contract, Henry Mordecai, assuming to be still owner, conveyed the same land to Miller in apparent obliviousness of the prior agreement made in his name, we cannot undertake to measure the influence which these declarations may have had on conducting the jury to the conclusion announced in their verdict. It is sufficient to say, the declarations ought not to have been received, and the error enters into and vitiates the finding.

We cannot accede to the suggestion of counsel that the improper testimony was only for the court, for it was, if competent, proper to be heard by both the court, in passing upon the admissibility of the acts and declarations of the agent, and by the jury in passing upon the weight of the testimony as to both facts. If not competent for the jury, it would not be competent for the court to act upon it. But it went before the jury and must have been considered by them in making their response to the issue.

For this error, and without considering the other errors assigned, the verdict must be set aside and a *venire de novo* awarded, and it is so adjudged. Let this be certified.

Error.

Venire de novo.

JAMES A. BARKER v. JOHN POPE and others.

Evidence upon question of sanity—Hearsay.

1. The declarations and opinions of persons not witnesses are incompetent evidence upon the question of one's capacity to make a deed; Hence the question—have you ever heard any one say that the grantor was wanting in capacity?—was properly ruled out.

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2. But the opinion of a witness founded on actual observation and personal knowledge of the state of the grantor's mind, is admissible.
3. Hearsay evidence and its incompetency to establish a fact, discussed by ASHE, J.
(*Clary v. Clary*, 2 Ired., 78; *Rowland v. Rowland*, *Id.*, 61, cited and approved.)

EJECTMENT tried at July Special Term, 1884, of RANDOLPH Superior Court, before *Graves, J.*

The plaintiff claims the land under a sale made by James A. Barker, as administrator of James Barker, deceased, of lands claimed to have belonged to James Barker, deceased, at his death, to raise assets to pay the intestate's debts.

It was agreed that James Barker died January 2d, 1868, and said sale was made about the year 1878, and the land in controversy purchased at said sale by one Foust, who paid the purchase money and took a deed from J. A. Barker, administrator, for said land, and thereafter sold and conveyed the same to the plaintiff, before the commencement of this action.

The defendants claim title under deeds executed and delivered by said James Barker deceased, to John Pope, on the 25th day of June, 1857, and the defendants in this action are the heirs-at law of said John Pope and others deriving title from him, the said John Pope having died since the commencement of this action. The issues were as follows :

1. Did James Barker, at the date of his alleged deed to John Pope, of the 25th of June, 1857, have mental capacity to execute said deed?
2. Is the deed by which plaintiff claims title valid and sufficient to place title in plaintiff?

During the progress of the trial there was much conflicting evidence given in regard to the capacity of the said James Barker, on the said 25th day of June, 1857.

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The defendants introduced one Neri Cox, who testified "that he had known the said James Barker for twenty years previous to his death in January, 1868: had lived in his immediate neighborhood, and that in his opinion, he had capacity in 1857 to make a deed."

The defendants then proposed to ask witness if he had ever heard anything said of the want of capacity of James Barker during his life. Objected to by plaintiff. Objection sustained and defendants excepted.

On the reply the plaintiff introduced one Parks, who testified "that he had known James Barker for many years before his death, and lived in his immediate neighborhood; that he had known him to make small business transactions but that in his opinion he did not have capacity in 1857 to make a deed."

On cross-examination defendants proposed to ask witness if he had ever heard the capacity of James Barker called in question before this action was begun. Objected to by plaintiff. Objection sustained and defendants excepted.

Verdict for plaintiff; judgment; appeal by defendants.

Messrs. J. T. Morehead and Scott & Caldwell, for plaintiff.

Mr. M. S. Robins, for defendant.

ASHE, J. Both parties claimed under James Barker. The defendants, as heirs-at-law of John Pope, claimed under a deed made by Barker to Pope in the year 1857. The plaintiff insists that James Barker, at the time of executing the deed to John Pope, did not have capacity to make a deed.

The defendants, in the course of the trial, introduced one Cox who testified that he had known Barker for twenty year previous to his death in 1868; had lived in his immediate neighborhood; and that, in his opinion, he had capacity in 1857 to make a deed. The defendants then pro-

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posed to ask the witness, *if he had ever heard anything said of the want of capacity of James Barker during his life.* To this, the plaintiff objected, the objection was sustained and the defendants excepted.

One Parks was then introduced, by the plaintiff, who testified that, though he had known Barker to make small business transactions, in his opinion he did not have capacity in 1857 to make a deed; and on cross-examination the defendants proposed to ask the witness, *if he had ever heard the capacity of James Barker called in question before this action was begun.* The plaintiff objected to the answer of this question, and the objection was sustained, and this is the defendants' second exception.

The first question proposed was offered with the view of supporting the testimony of Cox, and the latter, to weaken the testimony of Parks, the plaintiff's witness. The two questions, however, are substantially the same, and by interpretation mean—Have you ever heard any one say that James Barker was wanting in capacity? If such a question were admissible, the answer of the question—Have you ever heard any one say that he had capacity—would be equally admissible; and that would raise an inquiry into the state of Barker's mind, founded upon the declarations and opinions of persons who were not witnesses in the case.

Prior to the case of *Clary v. Clary*, 2 Ired., 78, it had never been held in this state that any other than an attesting witness to a will could give his opinion upon the question of sanity; but in that case it was held that, not only the subscribing witness to a deed, but any other witness who had opportunity of acquiring personal knowledge of the state of the grantor's mind might give his opinion upon the subject, because his opinion is founded upon actual observation. The reason why the attesting witnesses to a will were permitted to express an opinion upon the testator's capacity was, because it was their business to inspect and judge of

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the testator's sanity before they attested, and the law presumes that they did observe and judge of it. And it was said in that case, that if observation is presumed to be a sufficient ground for receiving in evidence the judgment of a witness, "we cannot conceive why the judgment of any witness actually founded upon such observation shall not be received in evidence."

This is as far as the rule has been extended. What persons who are not parties to the suit may say, or what opinions persons not witnesses may express in regard to the sanity or insanity of a testator or grantor, has never been allowed, because it is hearsay.

Mr. TAYLOR, in his work on Evidence, lays down the rule to be, that the extra-judicial statements of third persons cannot be proved as hearsay, unless such statements were part of the *res geste*; or made by deceased persons in the course of business; or as admissions against their own interest, § 175. And again he says, a fact of interest to a whole community may be thus established, but it is otherwise as to statements concerning facts as to which the community would be likely not to be impressed. § 185.

In *Rowland v. Rowland*, 2 Ired., 61, the defendant offered in evidence a bill of sale for a slave from his mother (the plaintiff's intestate) to himself. The plaintiff contended that the intestate, at the time of executing the deed, was *non compos mentis*, and on the trial offered to prove the declarations of one Cagle, who had married the grand-daughter of the intestate, and who had obtained from her a bill of sale for four other slaves, which deed bore even date with that executed to the defendant, but the evidence was rejected by the court below, and the ruling was sustained here.

In *Mima* (*Queen v. Hepburn*, 7 Cranch, 290, Chief Justice MARSHALL held the principle to be, that hearsay evidence is incompetent to establish any specific fact in its nature

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susceptible of being proved by witnesses who speak from their own knowledge. It is a rule of evidence that "hearsay" is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case is not the sole ground of its exclusion. Its intrinsic weakness, its incompetence to satisfy the mind of the existence of the fact, and the fraud that might be practiced under its cover, combine to support the rule that "hearsay" evidence is totally inadmissible.

Bearing on the same point is the decision of the court in *Robbins v. Treadaway*, 2 J. J. Marshall, 540, (court of appeals of Kentucky). It was an action on the case for a libel alleged to have been published by the defendant against the plaintiff as a circuit judge, and the capacity of the judge came in question. In the court below, to prove incapacity, the defendant was permitted to ask witnesses the opinions of persons who were not witnesses. This was held to be error, and the judgment of the court below was reversed. The court say: "The capacity of the judge must be ascertained by the opinions of intelligent witnesses. It is not allowable to prove the opinions of men who are not sworn, or even public opinion."

There is no error. The judgment of the court below is affirmed.

No error.

Affirmed.

MAUNEY BROS. v. L. H. LONG and another

Nonsuit.

A nonsuit cannot be entered after judgment.

CIVIL ACTION, tried at Fall Term, 1883, of CLEVELAND Superior Court, before *Gilmer, J.*

MAUNEY v. LONG.

This action was commenced before a justice of the peace and carried by the defendant's appeal to the superior court. A jury trial was waived, and the judge found the facts as follows:

The action was brought upon a sealed note given by the defendant Long to one Cornwall for a mule which Cornwall had sold to Long. Cornwall assigned the note to plaintiffs, and the suit was brought against both Long and Cornwall.

On the trial before the justice of the peace in October, 1882, the defendant Long pleaded a former judgment and a counter-claim for deficiency in the eyes of the mule.

To sustain the defence of former judgment, he offered in evidence the docket of the justice of the peace who tried an action between the same parties upon this identical note in August, 1882, from which it appeared that service of the summons had been accepted by Long, and, upon Cornwall's refusing to accept service, the summons was served on him by an officer.

On the return of the summons, the defendant Long pleaded a counter-claim for damages resulting from a deficiency in the eyes of the mule. The case was tried in August, 1882, and the counter-claim was allowed, and judgment rendered in favor of the plaintiffs against Long, the principal in the note for \$25.40, with interest, and against Cornwall, the surety, for \$76.20, and interest. Cornwall thereupon gave notice of an appeal, but never perfected it.

Not long after the rendition of this judgment, the plaintiffs informed Long that they intended to enter a nonsuit, to which the defendants who were both present made no objection; and thereupon the plaintiffs directed the justice of the peace to enter a nonsuit, and in accordance therewith he made the following entry upon his docket: "Plaintiff Mauney pays costs and orders suit stopped. September 21, 1882."

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In October thereafter the plaintiffs brought this action upon the note on which the judgment had been rendered in August.

His Honor, being of opinion that these facts did not have the effect to set aside or annul the judgment rendered in August, held that the plea of former judgment was good, and adjudged that plaintiffs' action be dismissed and the defendants go without day. From this judgment the plaintiffs appealed.

No counsel for plaintiffs.

Messrs. Gidney & Weeb and Hoke & Hoke, for defendants.

ASHE, J. The principle is so well settled and so familiar to the profession, that a nonsuit cannot be entered after judgment, we deem it useless to cite any authority on the subject. There is no error. The judgment of the superior court is affirmed.

No error.

Affirmed.

C. B. CURLEE v. JOHN E. SMITH.

Evidence—Recitals in Sheriff's deed—Executions—Declarations of defendant in ejectment—Wills.

1. The recitals in a sheriff's deed are *prima facie* evidence of the sale and execution, and this rule is not varied by the fact that the deed was made by the sheriff after he had gone out of office (THE CODE, § 1267) where the recitals correspond with his return upon the execution, made while he was in possession of the office.
2. The return upon an execution is *prima facie* evidence of what it states, and, where the execution is proved to be lost, the entry on

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the minute docket of the execution and its return is admissible as secondary evidence to show that a writ of *renditioni exponas* issued to the sheriff, and was in his hands at the time of the sale.

3. One who claims title through another, by deed purporting to convey a fee simple, is estopped to deny the title.
4. Declarations of a defendant in ejectment, relating to the claim he sets up to the land, are relevant to the issue and receivable in evidence.
5. The act of assembly (THE CODE, § 2174) requiring copies of wills to be recorded in the county where the devised lands are situate, is prospective, and refers only to wills proved after November 1, 1883—the time when THE CODE went into effect.

(*Rutherford v. Raburn*, 10 Ired., 144; *Hardin v. Check*, 3 Jones, 135; *Rollins v. Henry*, 78 N. C., 342; *Edwards v. Tipton*, 77 N. C., 222; *McPherson v. Hussey* 2 Dev. Eq., 323; *Patterson v. Britt*, 11 Ired., 383; *Smith v. Lowe*, 5 Ired., 197; *Ires v. Sawyer*, 4 Dev. & Bat., 51; *Thomas v. Kelly*, 1 Jones, 375, cited and approved.)

EJECTMENT, tried at August Special term, 1884, of UNION Superior Court, before *MacRae, J.*

The plaintiff offered in evidence:

1. A copy of the will of Bryan Austin, dated August 11, 1842, and admitted to probate in the county of Stanly, where the testator resided at the time of his death, devising the "Mill tract" of land, situate in Union county, to his widow, Tempy Austin, during the minority of his two sons, John W. and Calvin, and as each of them came of age, then one-half of said tract to go to him.

2. A copy of the will of John W. Austin, dated March 18, 1848, devising his interest in the land to his mother for life, remainder in fee to his brother Calvin.

3. A copy of a deed executed by C. Austin, sheriff, to the plaintiff, dated April 28, 1873, reciting the sale, the execution, and the judgment, to-wit, a judgment in favor of H. M. Houston against Calvin S. Austin.

4. The plaintiff then introduced as a witness the clerk of the superior court of Union county, who testified that he

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had made diligent search for the judgment and execution recited in the deed, and could not find them. He found a statement of the judgment and *rend. ex.* on the execution docket of Union county court, April term, 1863, which was offered in evidence, and is as follows: "H. M. Houston against Calvin S. Austin—judgment \$4.26, and interest from the 7th of April, 1862, and costs." "I advertised the within land according to law, and sold the same at the court house in Monroe on the 7th of April, 1863, at which time and place C. B. Curlee became the last and highest bidder in the sum of twenty-five dollars, which is applied as follows—my fees and commissions, two dollars and twelve cents retained." (Signed by C. Austin, sheriff.)

The clerk also testified that Austin ceased to be sheriff of said county in 1868, and one (name not stated) was sheriff in April, 1873.

5. The minute docket of the county court was then offered in evidence, which contained the entry, "H. M. Houston against Calvin S. Austin—Attachment levied on land, and order of sale."

6. A deed from J. Marshall, administrator of Tempy Austin, to John E. Smith (the defendant) 17th of December, 1872, was then put in evidence for the purpose of showing that the defendant claims under Tempy Austin, and as an estoppel on defendant to deny that Bryan Austin was the owner of the land.

The plaintiff, a witness in his own behalf, testified that he had known the land in controversy for fifty-five years; has an acre of it in cultivation; the land was known as the "Bryan Austin Mill tract" ever since he knew it; the mill went down about thirty years ago; Tempy Austin was in possession of one-half of the tract, and Bryan was in possession before her; she was in possession up to the time John died; Bryan, Tempy and John are now dead; Calvin died eleven years before his mother, and John died a con-

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siderable time before her death; Bryan was in possession when witness moved there fifty-five years ago, and remained in possession until he died in 1842.

The witness further testified that he went to see the defendant about the land, and the defendant claimed half of it, saying he bought it at the administrator's sale, mentioned above, and that it was put up as the property of Calvin S. Austin, but not sold as his, but was sold as the property of the intestate Tempy. Defendant also said he claimed all the mill-rocks, and only half of the land, because Calvin died before his mother.

The witness on cross-examination testified concerning the boundaries of the tract, but this is not material, as no question was raised as to the identity of the land.

The following issues were submitted to the jury:

1. Is the plaintiff the owner and entitled to the possession of the land described in the complaint?
2. Does the defendant wrongfully withhold the possession thereof from the plaintiff?
3. If so, what damage has plaintiff sustained?

The defendant, without offering any testimony, asked the following instructions:

1. In this action the plaintiff must recover upon the strength of his own title and not upon the weakness of that of the defendant, that is, the plaintiff must satisfy the jury by a preponderance of testimony that he has a title to the land, before the defendant is required to prove anything; and unless the plaintiff has so satisfied the jury, they must find for the defendant.
2. There is no evidence in this case, by paper title or possession, to show that Bryan Austin ever had title to the land in dispute.
3. Nor is the evidence sufficient to estop the defendant from denying that the title was in Bryan or Calvin Austin.

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4. That according to plaintiff's own testimony, he is not entitled to recover.

5. The wills of Bryan and John, not being recorded in Union county, where the land in dispute lies, are not sufficient to pass title to the land, and therefore the plaintiff cannot recover. Instructions refused.

After stating that it was admitted the defendant is in possession of the land in dispute and described in the complaint, the judge charged the jury as follows:

The plaintiff offers the wills of Bryan and John W. Austin, and the sheriff's deed conveying Calvin's interest, and a deed from the administrator of Tempy to defendant to show that he also claims under Bryan Austin; and there being no evidence to the contrary, the jury will be obliged to find that both plaintiff and defendant claim under Bryan Austin, so that it will not be necessary to trace the title further back than to Bryan Austin. Now, starting at Bryan Austin, the owner of the land, from whom both parties claim, the plaintiff offers evidence, which is not contradicted, of the will of Bryan, the will of John, the deed of the sheriff to plaintiff, dated April 28, 1873, and reciting the sale under execution in April, 1863; and if the jury believe the evidence, they will find the first and second issues in favor of the plaintiff. Exception by defendant.

There was a verdict accordingly, and the damages were assessed at twenty-two dollars and fifty cents. Motion for new trial. Motion overruled. Judgment for plaintiff, appeal by defendant.

Messrs. Payne & Vann, for plaintiff.

Messrs. Covington & Adams, for defendant.

ASHE, J. The errors assigned by the defendant for a new trial were, the admission in evidence of the deed of the sheriff under its recitals, to prove the sale and the execu-

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tion under which it was made; the entries on the execution and minute docket of the county court of Union county; the declarations of the defendant; the instructions given by His Honor to the jury, and his refusal to give those asked by the defendant.

We think the sheriff's deed was competent for the purpose for which it was introduced; and as incident thereto, so were the entries on the execution and minute docket of the county court.

It is incumbent on every one who purchases land at a sheriff's sale and claims title thereto through a deed of the sheriff, to show, if he be the plaintiff in the judgment and execution, a judgment, execution and sale; but if he be a stranger to the judgment, then he need not show a sale and execution, in the hands of the sheriff authorizing him to sell, issued from a court of competent jurisdiction. *Rutherford v. Raburn*, 10 Ired., 144. And the recitals in the sheriff's deed are *prima facie* evidence of the sale and the execution, because, as said by Chief Justice NASH in *Hardin v. Cheek*, 3 Jones, 135, "it is the act of a public officer in discharging his official duties, reciting how and by what authority he had made the conveyance, nevertheless open to proof that the fact did not exist." To the same effect is the more recent case of *Rollins v. Henry*, 78 N. C., 342.

But here, it is insisted by defendant's counsel that the sheriff had gone out of office, and at the time he made the deed he was not acting under oath; but the execution was proved to have been lost, and in such a case it is competent to resort to secondary evidence to prove the execution and that it was in the hands of the sheriff, or the person authorized to make the sale under it, at the time of the sale.

THE CODE, § 1267, provides that where a sheriff has made a sale of real or personal property while in office, and goes out of office before executing a proper conveyance therefor, he may do so after his term of office expires. And when he

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is dead or removes from the state without executing the conveyance, his successor in office may do so.

The recitals in a deed made by a successor in the office of sheriff, are held not to be evidence of the levy, sale, execution and judgment, because he is not under oath, and he professes to state only his opinion from information derived from other sources than his own knowledge. It is only hearsay. It differs from the return of a sheriff upon a writ, because that is upon the personal knowledge of the officer and is in the performance of a duty which he has sworn to perform. *Edwards v. Tipton*, 77 N. C., 222; *McPherson v. Hussey*, 2 Dev. Eq., 323.

The recitals in a deed made by an ex-sheriff are certainly entitled to more consideration than those in a deed made by a successor. They are not obnoxious to the objection of being hearsay, for they are made by one who has full personal knowledge of what he states. And when they correspond with his *return* of the execution, which is made at a time when he is in possession of the office and acting under the sanction of an oath, the obligation of which continues *pro hac vice*, we can see no reason why they may not be received in evidence, especially in a case like this, where the execution has been lost and recourse is had, from the necessity of the case, to secondary evidence; and to that end, the plaintiff introduced the minute and execution docket, and the sheriff's "return" of the execution, as set out in the statement of the facts.

The return of ex-sheriff Austin would not have been found on the execution docket unless it had been his return on the execution. The execution and *return* upon it, when returned to court, became records of the court; and the *return* duly made by a sworn officer upon process, in relation to facts which it is his duty to state in it, as to those facts, is conclusive as between parties and privies, but only *prima facie* evidence as to all other

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persons. Freeman on Executions, 365. But in this state, such "return" being of the acts and doings of a ministerial officer, although required to be returned into a court of record, are only *prima facie* to be taken as true and are not conclusive. *Patterson v. Britt*, 11 Ired., 383; *Smith v. Lowe*, 5 Ired., 197.

The return then is *prima facie* evidence of what it states; and taking all the evidence together, offered by the plaintiff, we are of the opinion it was sufficient to supply the lost record, and establish the fact that there was a writ of *venditioni exponas* issued to the sheriff in the case of H. M. Houston against Calvin S. Austin, and that he sold the land in controversy, and that C. B. Curlee became the purchaser.

This would put the title in the plaintiff if Bryan Austin had title. The defendant says he had no title; and the plaintiff replies, it makes no difference whether he had or not, the defendant claims under him as well as the plaintiff, and is estopped to deny his title; and to establish that position he relied on the deed of J. Marshall, administrator of Tempy Austin, to the defendant, conveying to him the land in controversy as the property of Tempy Austin: and to show that she claimed under Bryan, he referred to the will of Bryan and John W. Austin. By the will of the latter, she took a life estate, remainder to Calvin Austin; and John claimed under the will of Bryan.

It is true that when Marshall undertook to sell the land as the property of his intestate Tempy, his deed in fact passed nothing, for she had only a life estate, and was dead.

But the defendant received a deed from Marshall as her administrator purporting to sell the land as hers, and by doing so, he is estopped to deny that Tempy, and Bryan under whom she claimed, had title to the land. *Ives v. Sawyer*, 4 Dev. & Bat., 51; *Vason v. Allen*, 6 Greenl., 243; *Kimball v. Kimball*, 2 Greenl., 226; *Smith v. Ingold*, 13 Maine, 284; *Thomas v. Kelly*, 1 Jones, 375.

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There is no force in the exception taken by the defendant to the court's admitting the evidence in regard to the declarations of the defendant. They are always competent when relevant.

His Honor could not have given the first instruction asked for, as there was no evidence offered by the defendant, and there could have been no preponderance of evidence in the case.

The second instruction asked has already been considered. If both parties claim under Bryan Austin, it could make no difference whether Bryan had title or not.

The third instruction has been considered and disposed of by what we have had to say in regard to the estoppel upon the defendant, by reason of his receiving a deed from the administrator of Temy Austin.

The fourth instruction asked could not have been given upon the facts as developed in the case.

The fifth was properly refused. THE CODE, § 2174, requiring certified copies of wills to be recorded in the office of the superior court clerk in the county where the land lies, refers only to wills proved after the first of November, 1883. The statute is prospective. There is nothing in it that tends to show it is retroactive. We cannot believe the legislature intended that old wills made eighty or a hundred years ago, devising lands in different counties, should be recorded in the county where the lands lie.

There is no error. The judgment of the superior court is affirmed.

No error.

Affirmed.

SHACKELFORD v. MILLER.

M. CATHARINE SHACKELFORD and others v. J. K. MILLER
and others.

Judgment—Widow—Dower.

1. While judgments should be signed and entered in term time, yet where parties consent that the same may be signed by the judge after the term has expired, and entered as of the term, it is not irregular. (The transactions in reference to the sale of land in this case were fair and just.)
 2. A widow who elects to take under her husband's will, is not entitled to dower. But so much of the land as does not exceed the quantity to which she would be entitled by right of dower, is exempt from her husband's debts, during her life. THE CODE, § 2105. There is nothing in this case entitling the plaintiff to any equitable relief in respect to her claim of dower.
- (*Herrey v. Edmunds*, 68 N. C., 243; *Harrell v. Peebles*, 79 N. C., 26; *Molyneux v. Huey*, 81 N. C., 106, cited and approved.)

MOTION to set aside a judgment, &c., heard at Spring Term, 1884, of ONSLOW Superior Court, before *Shepherd, J.*

It is alleged that the defendants Miller and wife, on the 15th of December, 1875, executed a mortgage to C. O. Foy, to secure a certain debt, and on the 12th of November, 1878, they executed a second mortgage on the same land to L. W. Humphrey to secure a debt therein named, and on the 1st of January, 1881, the said Humphrey assigned the notes so secured to John W. Shackelford, who died in January, 1883, and the plaintiff qualified as executrix of his will. She afterward married George Brooks. Foy died and the defendant West qualified as administrator.

An action was brought by L. W. Humphrey and J. W. Shackelford against J. K. Miller and wife, to foreclose the mortgage made to Humphrey, and in this action it was alleged that Humphrey had assigned the mortgage debt, due him by Miller, to J. W. Shackelford.

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At a subsequent term of the court the death of Shackelford was suggested, and the plaintiff, his widow and executrix, was made a party and filed an amended complaint.

At spring term, 1883, a decree was made adjudging that the defendant West, administrator of C. O. Foy, recover the debt due his intestate; that the plaintiff recover that due her testator, and that the defendants Miller and others be foreclosed of all equity of redemption in the land. And it was further ordered that A. C. Huggins, as commissioner, advertise and sell the land if the indebtedness was not paid as directed.

At fall term, 1883, the commissioner made report of sale and the same was confirmed, and title directed to be made to L. W. Humphrey (who bid off the land) upon his paying the purchase money—\$4,336. This decree was signed by the judge, as of the said term of Onslow superior court, but was in fact signed about two weeks after said term had expired, and at Carteret superior court; and this was done by consent of all the parties or their attorneys.

On January 5, 1884, Humphrey assigned his bid to one Stephens, and directed the commissioner in writing to make title to him. Stephen's paid the purchase money on the 10th of the month in cash, except the sum of \$2,192.45, which he paid in a note executed by John W. Shackelford to said Humphrey and assigned to Stephens; and the sum of \$162.91, which he paid in a note against Foy. The commissioner made the settlement in this way, under the belief that it was agreeable to all parties concerned, and executed a deed to Stephens conveying the property.

A restraining order to prevent the commissioner from executing the deed was obtained at the instance of the plaintiff executrix, but it was not served until after the deed was delivered. And upon the hearing of the matter, it appeared to the judge that the commissioner had collected the pur-

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chase money and had it in hand subject to the order of the court, and thereupon the proceeding was dismissed.

Afterwards, the plaintiff executrix caused notices to be issued to all the parties to the original action, and also upon Stephens and the said commissioner and W. H. Henderson, to show cause why the motion she now makes shall not be granted; that is, to set aside and vacate the judgments and decrees made at the spring and fall terms, 1883, of Onslow superior court. His Honor, having found as a fact that the parties and the attorneys acted in entire good faith in consenting to the signing of the decree at Carteret; that the sale of the land was conducted fairly, and the price reasonable and just; that the whole of the purchase money was paid to the commissioner upon his notifying Stephens that the note on Shackelford was not satisfactory to his executrix, and that the same was in the hands of the commissioner subject to the order of the court, declined to grant the motion.

The plaintiff further moved that she be declared entitled to dower in the lands of which her husband died seized, and the lien in favor of Foy's estate be discharged out of the personal estate of her testator. And upon this matter the court found that said Shackelford left no real estate, except his interest as follows:

That subsequent to the execution of the mortgage by Miller to Humphrey, said Shackelford purchased of said Miller his equity of redemption in the property sold under the decree herein, and obtained a proper conveyance therefor; that afterwards said Humphrey assigned the notes due him by Miller to said Shackelford; that instead of redeeming said land by paying the Foy debt, the said Shackelford and wife became parties to the proceedings under which the land was sold, and that the plaintiff, as executrix, was made a party plaintiff, and that the land was sold according to the prayer of the amended complaint to pay the indebted-

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ness secured by mortgage as stated therein, the land not bringing enough to pay the same. The court, being of the opinion that the equity of redemption had been foreclosed by the decrees, and at the instance of the plaintiff, and having declined to set aside said decrees, adjudged that the motion be refused, and the commissioner was directed to pay the purchase money to the executrix or other personal representative of said Shackelford, according to the decree.

The plaintiff further moved that the deed made by the commissioner be declared inoperative and void, and that Stephens be adjudged to have bought the land with notice of her equity, and declared a trustee for her benefit. It was conceded that Humphrey bought the land under an agreement to re-convey to plaintiff upon certain conditions, but there was conflicting testimony as to whether the conditions were duly performed by her, and whether Stephens had notice of said agreement before he purchased of Humphrey.

The court being of the opinion that a motion in the cause was not the proper remedy to convert the said Stephens into a trustee, declined to pass on the above questions of fact, and refused the motion.

Judgment was rendered according to the above rulings, and the plaintiff appealed.

Mr. S. W. Isler, for plaintiff.

Messrs. Faircloth & Allen, for defendant.

MERRIMON, J. In our judgment, no one of the appellant's exceptions can be sustained.

1. The decree made at the fall term, 1883, of the superior court of Onslow county, confirming the report of the sale of land, was in execution of the decree directing the sale thereof, entered at the spring term of that court of the same year. It does not appear, that either of these decrees was irregular in any material respect. Each respectively pur-

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ports upon its face and by the record, to have been regularly entered at the terms mentioned. But it appears, that in fact the judge, who presided at the fall term, with the consent and sanction of all the parties to the action, or their attorneys, including that of the attorneys of the plaintiff, (Mrs. Shackelford, now Mrs. Brooks,) who makes the motion under consideration, indeed, at their instance signed the decree last made, two weeks after the fall term, while on and in the course of his circuit, during the term of the superior court of Carteret county.

It was agreed at the fall term of the former court, that the decree of confirmation should be prepared, and when signed by the judge out of term, be filed and entered as of that term.

It is insisted that the signing of this decree out of term time and during the term of another court, rendered it irregular, if not void, and this is assigned as one ground for the motion to set aside that decree.

Although the practice of signing decrees and judgments out of term-time, and away from the county in whose court the action is pending, is not to be encouraged, because it leads to more or less confusion and complaints, as in this case, and may sometimes be abused, or misunderstood, still it is not unwarranted, in cases where the parties to the action, or their counsel, consent to it. Indeed, sometimes it is necessary and important that such practice shall be indulged. Judgments and decrees thus signed are not thereby rendered irregular, much less void. The date of entering them should, however, always be noted on the record, in order to prevent confusion as to the time when they take effect, and when liens created by them become operative.

This court has repeatedly upheld judgments and decrees thus granted, and it is well settled that such practice is not inconsistent with the constitution and statutes of the state. The constitution provides that, "the superior courts shall

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be, at all times, open for the transaction of business within their jurisdiction, except the trial of issues of fact requiring a jury." Art. IV, § 22. There is no statute regulating the course of judicial procedure and practice, or rule of practice that prevents the signing of judgments and decrees and entering them at any time, with the consent of the parties to the action. *Hervy v. Edmunds*, 68 N. C., 243; *Harrell v. Peebles*, 79 N. C., 26; *Molyneux v. Huey*, 81 N. C., 106.

2. If it be granted, that the decrees mentioned can be attacked for fraud, or fraudulent surprise in procuring them, to the prejudice of the plaintiff, by a motion in the action, the court below has found as facts, that there was neither fraud nor surprise on the part of any one; that her counsel in fact, represented no interest adverse to her; that they demeaned themselves as her counsel in entire good faith; that they, together with the other parties to the action whom they did not represent, or their counsel, consented that the decree complained of should be signed by the judge at the term of the court in Carteret county as of the term of the court in Onslow county; that the sale of the land was fair, and the price paid for it was reasonable and just; that the whole of the purchase money had been paid to the commissioner who sold the land; that when the commissioner notified the assignee of the purchaser of the land, that the note of the testator (Shackelford) was not satisfactory to the executrix, he paid the whole of the purchase money in cash, and the same was in the hands of the commissioner subject to the order of the court.

These findings are conclusive. We see no reason to disturb them. They preclude every semblance of ground for setting aside the decrees for fraud or surprise. Although in strictness, the commissioner ought to have received the whole of the purchase money before executing the deed, as the decree directed him to do, still as he at last received the money and holds it subject to the further order of the court,

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this must be treated as a substantial and sufficient compliance with the terms of the decree. He acted in good faith, and the appellant has suffered no detriment by his action. She will share in the fund just as she would have done, if the whole sum of money had been paid before the deed was executed. It seems that the commissioner believed that the note of the testator would serve the same purpose as cash in hand. In this, however, he was mistaken. But he corrected his mistake promptly, and this is sufficient. The court will not disapprove of, and set aside the acts of its officers when they honestly and in good faith make slight mistakes, that do not affect the substantial rights of parties interested.

3. There does not appear to be the slightest foundation for the motion for dower, even if it were germane, to this action. The plaintiff has not dissented from her late husband's will; on the contrary, she qualified as executrix thereof and took under it as sole devisee and legatee. She is not entitled to have dower assigned to her. She took under the will such real estate as passed by it, and so much of it as does not exceed the quantity to which she would be entitled by her right of dower under the statute, cannot be reached by creditors of the testator. THE CODE, § 2105.

We are unable to discover any equity in her favor arising under the circumstances of this case, to have the first mortgage upon the land mentioned discharged out of the personal estate of the testator, to the end, she may have dower in the land embraced by the mortgage. There was no obligation, equitable or otherwise, resting on the testator in his life-time, or upon his executrix after his death, to pay the first mortgage debt. Indeed, the executrix could not do so in her own interest as sole devisee and legatee, to the prejudice of creditors. The latter are entitled to have their debts paid first out of the personal estate, and these paid, she would take all the property left, both real and personal.

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The husband was not bound in his life-time, nor is the executor of his will bound in any way to provide land out of which his widow might have dower. Besides, it appears that the estate is insolvent.

The testator had in his life-time purchased the equity of redemption in the land mortgaged to pay the first and second mortgage debts, but it has turned out that the land did not sell for a sufficient sum of money to pay the whole of the mortgage debts, and therefore the equity of redemption owned by the testator was of no value, and of course the widow could get no dower, nor money in lieu of dower in it. The mortgage debt could not, in any equitable view of it, as seems to be supposed, be treated as reality. It was of and simply belonged to the personal estate of the testator. It was like and on the same footing as any other debt due the estate, except that it was secured by the mortgage.

Besides, if in any possible view the plaintiff could be entitled to any equitable relief in respect to her claim of dower, her motion comes too late. Her late husband, in his life-time, joined in this action to sell the mortgaged land, and out of the proceeds of such sale pay the mortgage debts, and after his death she, as the executrix of his will, and sole devisee and legatee under it, became a party to the action, and joined in the prayer for the sale, and is concluded by the record. The court properly denied the motion in respect to dower.

4. We concur in the opinion of the court below, that any claim the plaintiff may have upon L. W. Humphrey as her agent in the purchase of the land, and like claim she may have upon the assignees of his bid for it, cannot be properly litigated in this action. It is a cause of action, if it exists, apart, entirely distinct from, and foreign to the present one, or any purpose contemplated by it.

No error.

Affirmed.

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R. M. STAFFORD, Adm'r, v. JONES BROTHERS.

Mortgage, construction of—Interest.

Where a mortgage is made to indemnify one against loss by reason of becoming surety upon a note executed to negotiate a loan to carry on business, and the mortgagor makes default; *Held*, that while a provision in the deed rendering the property liable for "no more than \$5,000" is a limitation upon any increase of the debt, yet interest is recoverable as an incident to the debt.

(*McNeely v. Carter*, 1 Ired., 141; *Dwiggins v. Shaw*, 6 Ired., 46, cited and approved.)

CIVIL ACTION to foreclose a mortgage, heard at July Special Term, 1884, of GUILFORD Superior Court, before *Graves, J.*

The suit was brought by R. M. Stafford and W. M. Houston, administrators of Seymour Steele, against Jones Brothers and Manfred Call, to foreclose a mortgage, of which the following is a copy:

Whereas, Seymour Steele has become the security for the payment of the sum of five thousand dollars to the National Bank of Greensboro upon a certain promissory note dated the 1st day of June, 1876, and payable twelve months after date, signed by Jones Brothers as principal and the said Steele as security; and *whereas*, the said Jones Brothers, a firm consisting of E. P. Jones, J. L. Jones and J. P. Jones, are engaged in the business of manufacturing and working tobacco in the factory hereinafter described, for which factory the said Jones Brothers have contracted with the party of the first part hereinafter named, and by whom the said factory and premises connected therewith is owned, and who for the purpose of assisting and enabling the said Jones Brothers to carry on their said business of manufacturing,

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hath agreed to mortgage the said factory and premises in their behalf to enable them to obtain money to that end : Now therefore : This indenture, made and entered into this the 30th day of May, 1876, by and between Manfred Call and S. E. Call, his wife, of the city of Richmond and commonwealth of Virginia, of the first part, and Seymour Steele, of the city of Greensboro and state of North Carolina of the second part; *witnesseth*,

That for and in consideration of the said Seymour Steele becoming the security for the said Jones Brothers to the said National Bank for the said sum of five thousand dollars borrowed money, to enable the said Jones Brothers to carry on their business of manufacturing tobacco in the said factory as aforesaid, and for the further consideration of the sum of one dollar in hand paid by the said party of the second part to the said party of the first part, the receipt of which is hereby acknowledged, the said party of the first part hath bargained, sold, and conveyed, and by these presents doth bargain, sell and convey unto the said party of the second part one large brick tobacco factory (known as the Jones Brothers factory, where they are now doing business) and fixtures contained therein and used in the manufacture of tobacco. [Said factory being located in Greensboro, &c.]

To have and to hold with all the appurtenances thereto belonging, or in any wise appertaining unto the said Seymour Steele, party of the second part, his heirs and assigns forever. Upon the express condition nevertheless, that if the said Jones Brothers shall pay to the said National Bank the said sum of five thousand dollars due as aforesaid, then this deed and every part thereof shall be void and of no effect. Otherwise, it shall remain as an indemnity to the said Steele for all losses which he may sustain by reason of his suretyship to the said bank for the said Jones Brothers for the said sum of five thousand dollars; the said property to be liable as an indemnity for no more than five thousand dollars.

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In testimony whereof the said party of the first part hath hereunto set their hands and seals, this the 30th day of May, 1876. (Signed and sealed by Manfred Call and wife.)

The question was as to the proper construction of this mortgage.

At the hearing of the case, it was admitted by the defendants that Jones Bros. had made default as contemplated by this mortgage, and that the plaintiffs were entitled to a decree of foreclosure, and for a sale of the property therein mentioned, to pay the sum of five thousand dollars, *and no more*. The plaintiffs however contended that they were entitled to be paid that sum, and, under a proper construction of the mortgage, *the interest thereon*.

The court held that the indemnity provided was for only the sum of five thousand dollars. Thereupon the plaintiffs excepted and appealed to this court from the judgment rendered.

Messrs. J. T. Morehead and John H. Dillard, for plaintiffs.

Messrs. Scott & Caldwell, for defendants.

MERRIMON, J. The single question presented for our decision is, whether or not the plaintiffs are entitled to be indemnified under the mortgage before us, as to the interest that has accrued, or may yet accrue, upon the debt of \$5,000 due to the National Bank of Greensboro, therein mentioned? We are of the opinion, that under a proper construction of the mortgage, they are so entitled.

It is manifest that the general and leading purpose of the mortgage, as it appears by the stipulations and qualifications contained in it, was to indemnify the intestate of the plaintiff against all loss incident to his liability as surety to the note of Jones Bros., given to the bank. The fair inference from the face of the mortgage and particularly the

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facts stated in the preamble thereof, is, that the intestate had no interest in the business of the firm named; that he became their surety purely as a matter of favor and good will; but the defendant Call had contracted to sell them the tobacco factory and premises connected therewith, and had a personal and valuable interest in the success of their business, and for the purpose of enabling them to carry on their business of manufacturing tobacco, he "agreed to mortgage the said factory and premises *in their behalf to enable them to obtain money to that end.*" In effectuating this purpose, he executed the mortgage. It is stipulated in it, that the note for \$5,000 shall be paid, "when due as aforesaid," that is, twelve months next after the first day of June, 1876, then, the deed of mortgage should "be void and of no effect," but if it shall not then be paid, then it should "*remain as an indemnity to the said Steele for all losses which he may sustain by reason of his suretyship to the said bank for said Jones Bros., for the said sum of five thousand dollars, the said property to be liable as an indemnity for no more than five thousand dollars.*"

It is contended by the defendant Call, that the words, "the said property to be liable as indemnity for no more than five thousand dollars," limits the indemnity provided to that exact sum. We cannot accept this interpretation as the correct one.

The words must be given such import as will make them, and the provision embodied in them, harmonize with the general purpose of the agreement, and the particular stipulations and qualifications contained in it, if this can be done. The general purpose was, as we have seen, to indemnify the intestate against all loss incident to the suretyship. The surety had no interest in Jones Bros.' enterprise so far as appears, but Call did. And it is provided in terms, that if default in the payment of the debt at maturity shall be made, the deed shall "remain as an indemnity to the said

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Steele for all losses which he may sustain by reason of *his suretyship* to the said bank " for the debt. Any interest due on it, if not paid, was incident to and part of it. If Steele had paid the debt at maturity, he would have been entitled to interest upon the money so paid by him until he should be repaid. Why then should he not be indemnified for the incidental part of the debt as well as the debt itself? The nature of the transaction suggests that the indemnity should extend to the interest. Apart from the stipulations in the agreement, in the order of such things, the indemnity would extend to the interest, and taking the stipulations and qualifications in their spirit, they contemplate that it shall so extend.

But it is asked, what effect is to be given to the plain words of limitation as to the liability of the mortgaged property? Are they to be eliminated merely? Certainly not. They must be given their legitimate weight. But they were intended to serve a different purpose from that so attributed to them. This purpose is obscured by their location and connection in the agreement. The debt was created and the mortgage made to enable Jones Bros., to whom Call had contracted to sell the factory and premises connected with it, to carry on their business of manufacturing, and the mortgage of the property that belonged to Call was made specially, "to enable them to obtain money,"—how much, is not in this immediate connection specified; but it is made definite in the subsequent clause, which provides, that "the said property to be liable as an indemnity for no more than five thousand dollars," that is, for not more than the debt mentioned and the interest that might come due upon and as part of it. The limitation was intended to prevent any increase of that debt by enlarging the note, or getting money by means of a new note, "to carry on the said business of manufacturing." The sum of money realized from the note was all that was intended to be obtained

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through the means of the mortgage, and to render certain the indefinite purpose expressed in the preamble, to get money to carry on the business by means of the indemnity provided by the mortgage. The limitation was inserted, not in the connection where it ought to appear, but in a subsequent provision. If the clause limiting the amount of the debt had been inserted in its proper place at the end of the preamble, its meaning and purpose would have admitted of little question.

The real end to be attained in construing agreements, is to ascertain and determine accurately what the contracting parties engaged to do or not to do. In accomplishing this purpose, it is a well understood rule of construction, that the whole of the agreement must be considered, and not simply parts of it. When it contains stipulations and qualifications, it cannot be, that the intention of the parties was, that some of them shall be altogether or partly disregarded, while others are given undue weight and importance and allowed to shape and control the effect of the agreement; on the contrary, such meaning must be given to particular parts, as will, without violence to words, be consistent with all the other parts and with the evident purpose and intention of the contracting parties. Regard is to be paid, not simply to the language of any particular part of the agreement, but to the language and bearing of the whole of it, where there is seeming conflict. If there be found in any particular clause an expression not so comprehensive in its import as other clauses or words may be, and that these are contradictory or inconsistent, and that upon a view of the whole instrument the real intention of the parties can be ascertained, effect must be given to that intention, notwithstanding the words or clauses of less import. And in order to ascertain such intention, words and clauses may be transposed, so as to give them their legitimate weight and effect. It is oftentimes necessary to do this in order to

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give effect to an agreement, and effectuate the real intention of the parties. *McNeely v. Carter*, 1 Ired., 141; *Dwiggins v. Shaw*, 6 Ired., 46; Smith on Contracts, 404, *et seq.*

We think that the court below erred in its construction of the mortgage in question, and that its judgment must therefore be reversed. Let this be certified to the superior court.

Error.

Reversed.

E. S. HARKNESS v. HANNAH HARKEY.

Wills.

A testator disposes of his plantation, household and kitchen furniture, and makes sundry money legacies as the "full shares" of the legatees named, and then provides, after payment of debts, "that the remainder of my property be sold and equally divided between my two sons;" *Held*, that the court below erred in holding that the money on hand at the testator's death was undisposed of. The testator did not intend to die intestate as to any of his property. The money on hand and the proceeds of sale of "the remainder of his property" go to make up the residuary fund to be divided between his sons.

(*Bradley v. Jones*, 2 Ired. Eq., 245; *Alexander v. Alexander*, 6 Ired. Eq., 229; *Scales v. Scales*, 6 Jones Eq., 163; *Hogan v. Hogan*, 63 N. C., 222, cited and approved.)

CIVIL ACTION for construction of a will, heard at Spring Term, 1884, of UNION Superior Court, before *MacRae, J.*

E. S. Harkness and P. C. Stinson, executors of John Harkey deceased, brought this action against the widow and heirs-at-law of the testator to obtain a construction of his will.

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The court below adjudged that the testator made no disposition of the money (now in his executors' hands) and is therefore intestate as to that fund. From this judgment the defendants appealed.

Messrs. Payne & Vann, for plaintiffs.

Messrs. Covington & Adams, for defendants.

MERRIMON, J. The following is a copy of the material parts of the will, we are called upon to construe :

1st. I will and devise that my wife, Hannah Harkey, have the plantation, household and kitchen furniture, and everything that belongs to the plantation on which I now live during her natural life, then said plantation, containing one hundred and twelve acres, to be Clark Harkey's during his natural life, and if he die without heirs, then said land to go to John F. Harkey or his heirs.

2nd. I will that Madison Harkey's heirs each shall have ten dollars apiece, and that shall be their full share.

3rd. I will that Thomas Harkey shall have fifty dollars, and James Milton Harkey shall have fifty dollars, and that Mary C. Harkey shall have fifty dollars, and Ida F. Harkey shall have fifty dollars, and that Ellen Harkey shall have fifty dollars, and that Louisa Harkey shall have fifty dollars, and that shall be their full share.

4th. I will and devise that after my just debts are paid, and burial expenses of myself and wife Hannah, that the remainder of my property be sold and equally divided between my two sons, Clark W. Harkey and John F. Harkey, and that they shall furnish suitable tombstones for myself and wife Hannah out of the 4th item of this my will.

It seems to have been the purpose of the testator not to die intestate as to any of his property, but to dispose of the whole of it, of every kind, by his will. He first makes particular dispositions of portions of it, and then, in the last

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clause, he makes a sweeping residuary provision in favor of his two sons. After having made provision for his wife and certain other persons, and for the payment of his debts and the burial expenses of himself and his wife, he then provides, "that the *remainder of my property* be sold and equally divided between my two sons, Clark W. Harkey and John F. Harkey, and that they shall furnish suitable tombstones for myself and wife Hannah out of the 4th item of this my will."

The words, "the remainder of my property," are very broad and comprehensive in their meaning, and no purpose to use them in a restricted sense appears. He had, just before he employed them, disposed of land, "household and kitchen furniture, and everything that belongs to the plantation," and likewise provided pecuniary legacies amounting to several hundred dollars. He was advertent to the variety of his property; he thought of the various kinds he had, and by the "remainder" he meant all like property he might have at the time of his death. The word "property" is broad enough in its legal meaning to embrace money-notes, bonds and the like, and the word "remainder" implies all, the whole that is left. Besides, his sons Clark and John seem to have been the chief objects of his bounty after providing for his wife. He devises his plantation to his wife for life, then to his son Clark for his life, and if he should die without children, then to John or his heirs. As to those to whom he gives pecuniary legacies, he expressly provides that what he gives them respectively "shall be their full share," plainly meaning their full share of his whole estate.

The purpose of the testator, after the provisions made in the first clause of his will, was to turn his whole estate into a cash fund, and after paying his debts, burial expenses and the pecuniary legacies, to divide the remainder equally between his two sons, Clark and John. This much he charged

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his executors to do, and then he charged his sons to "furnish suitable tombstones" for his wife and himself out of the fund they might realize out of the fourth clause. The money on hand at his death served the purpose of paying the debts and legacies, and any part of it left remained ready to be divided as part of the general residuary fund arising from the sale of the property. The fourth clause must be taken as meaning that the property other than cash shall be sold to make the whole fund, cash, to be divided.

It is suggested that the testator did not mean by the fourth clause of his will that the money on hand should be sold; that such a direction would be idle and nonsensical, and therefore he did not dispose of, nor intend to dispose of the money on hand at the time of his death. We agree that he surely did not intend that the money should be sold, but *non constat*, that he did not intend to dispose of it as part of his property given to his two sons. The general purpose manifested by the will as a whole, as well as its several provisions, go to justify the construction we give it, and the mere fact that the testator omitted in the residuary clause to specify that the money should not be sold, but should go to increase the fund raised by the sale of other property, cannot be allowed to disappoint the purpose indicated in the way we have pointed out. It is more reasonable to conclude, that he meant to direct the sale of such parts of the remainder of his property as might be necessary to turn the whole of it into a cash fund for the purpose contemplated. It is sufficient that it appears that the testator intended that his money on hand, and as well, his choses in action, should pass by the residuary clause.

There are cases no doubt somewhat similar to this, where the implication that the money on hand and the choses in action passed under a residuary clause did not arise, and it was held that the testator died intestate as to such things.

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Such are the cases of *Bradley v. Jones*, 2 Ired. Eq., 245; *Alexander v. Alexander*, 6 Ired. Eq., 229, and *Scales v. Scales*, 6 Jones Eq., 163; but in these and like cases, the intent of the testator not to die intestate, and to giye his cash and choses in action to certain of his children, did not appear as strongly as in this case. This case is more like that of *Hogan v. Hogan*, 63 N. C., 222.

The superior court erred in the advice and direction it gave the executors. The cash on hand, after the payment of debts, funeral expenses and pecuniary legacies, ought to go with the proceeds of the sale of the remainder of the property that must be sold, to the two sons, Clark W. Harkey and John F. Harkey, and we so advise and direct. Let this be certified to the superior court according to law.

Error.

Reversed.

 D. L. BOING v. RALEIGH & GASTON RAILROAD
COMPANY.
Railroads—Negligence—Damages.

1. The decision in *Roberts v. Railroad*, 88 N. C., 560, to the effect that the measure of plaintiff's damages in an action against a railroad for killing a cow, is the difference between the value of the animal, living, and of its dead body, as beef, is approved.
 2. A new trial is awarded upon the issue as to damages, but the findings upon the other issues will remain undisturbed.
- (*Roberts v. Railroad*, 88 N. C., 560; *Burton v. Railroad*, 84 N. C., 192; *Lindley v. Railroad*, 88 N. C., 547, cited and approved.)

CIVIL ACTION tried at Spring Term, 1883, of VANCE Superior Court, before *Gilmer, J.*

The defendant appealed.

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Messrs. Young & Henry, for plaintiff.

Messrs. Hinsdale & Devereux, for defendant.

SMITH, C. J. The plaintiff's action is to recover damages for his cow run over and killed by the train of the defendant from the negligence and mismanagement of its officers and servants in charge.

The only exception presented on the defendant's appeal is to the refusal of the court to charge the jury that the measure of the plaintiff's damages was the difference between the value of the cow, living, and of its dead body, as beef.

The killing is not itself a conversion of the animal to the use of the defendant, but it remained still the property of plaintiff and at his disposal, and whatever price it would then and there command, should go in mitigation of damages. This is the rule where the injury does not cause death, and as cows are used for food, there is no sufficient reason for not making the deduction asked in the present trial.

The case falls directly within the ruling in *Roberts v. Railroad*, 88 N. C., 560, which, as we were told in the argument, had not been reported when the trial took place. We are content to refer to this as a decisive adjudication which must control.

There is error and there must be a new trial upon the issue of damages, while the other findings will remain undisturbed, as was the course pursued in *Burton v. Railroad*, 84 N. C., 192; *Lindley v. Railroad*, 88 N. C., 547. The cause will be remanded to this end.

Error.

Venire de novo.

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MELVILLE DORSEY v. RALEIGH & GASTON RAILROAD
COMPANY.

Appeal Bond.

An appeal bond made payable to the state is void. The state will not become a trustee for a citizen in the pursuit of his personal rights, except in cases specially provided by law—as guardian bonds, &c.

(*Office v. Huffstetter*, 67 N. C., 449; *State, &c., v. Shirley*, 1 Ired., 597, cited and approved.)

CIVIL ACTION, commenced before a justice of the peace, and tried on appeal at June Term, 1883, of VANCE Superior Court, before *Gilmer, J.*

Upon call of the case in this court the defendant moved to dismiss the appeal.

Messrs. Young & Henry, for plaintiff.

Messrs. Hinsdale & Devereux, for defendant.

SMITH, C. J. The defendant moves to dismiss the appeal on the ground that the appellant's undertaking does not conform to the requirements of the statute, and is ineffectual as a security for his costs. It is in form a penal bond, drawn payable to the state with condition, which, after reciting the rendering of judgment and the intended appeal for which it is given, proceeds in these words:

"Now therefore, if the said judgment or any part thereof shall be affirmed, or this appeal shall be dismissed, then and in that case, this obligation to be in full force and effect, and the above bounded, Melville Dorsey and R. E. Young, to pay all costs that may be awarded against this appellant on such appeal, and all damages which the court

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may award against him; otherwise this obligation to be null and void."

The objections to the instrument are, that being executed to the state, it cannot be enforced as a security for the appellee, and that the condition is unreasonable and void in declaring the obligation void in the contingency of the defendant's being adjudged his costs and the plaintiff's failure to pay them.

We should not hesitate to hold that the inconsistency of the concluding clause, with the other provisions contained in the condition, does not vitiate and annul the obligation, and may be discarded as repugnant to the general scope and clearly expressed purpose of the bond to provide for the costs of the appellee, if the motion was based upon this defect alone.

It is laid down in Hurl. on Bonds, 31, (9 Law Libr.) as a principle of construction, that where the condition of a bond was, if the obligor did not pay, where the negative was improperly inserted, a certain sum to the obligee, then the obligation to be void, the repugnant part will be rejected and effect be given to the obligation according to the manifest intent of the parties.

The author's citations fully support his proposition. *Wills v. Wright*, 2 Mod., 285; *Wells Tregusan*, 2 Salk., 463.

But the other objection to the bond is fatal to its validity. Had no person been named in the undertaking to whom it was payable, and the instrument been without seal, it would have been sufficient under the ruling in the case of the *Clerk's Office v. Huffstetter*, 67 N. C., 449, a conclusion arrived at not without much hesitancy as shown in the opinion of the court.

But the state does not permit itself in its sovereign capacity to become a trustee for its citizens in the pursuit of their personal rights, except in cases specially provided for by law, and when it has delegated the power to agents to

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take securities in its own name, as in the case of guardian bonds and the like.

Nor can such a bond be upheld as good at common law, since this would be only when the bond is beneficial to the state in its corporate capacity. *State, &c., v. Shirley*, 1 Ired., 597.

We are unable to sustain the instrument by rejecting the words by which the obligation to the state is incurred, even if without them the residue would be a substantial compliance with the act, for this is the substance of the contract, while the other is the avoidance; and no construction is admissible which substitutes an obligee in the place of the one with whom, in form, the parties who execute the bond undertake to contract.

The motion must be sustained and the appeal dismissed, and it is so ordered.

Appeal dismissed.

J. E. OSBORNE and wife v. WILLIAM MULL and wife.

Partition—Marriage prior to act of 1848—Right of husband to convey without joinder of wife—Tenant by Courtesy—Estoppel—Tenants in remainder cannot compel partition.

1. The *feme* plaintiff and her husband made a verbal agreement with the *feme* defendant and her husband to divide the land acquired through the *femes covert*, and the same was accordingly done and mutual deeds executed conveying the share allotted to each, but without the privity examination of their wives. The marriages took place prior to the act of 1848, (THE CODE, § 1840) and there were children born alive; *Held*,

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(1) The husbands are tenants by the courtesy initiate, and have the right to convey their interest without the signature and privy examination of their wives.

(2) It was competent to make the division in such case, and it must stand at least until one of the husbands shall die, and each is estopped by his deed to deny the title of the other in the part so conveyed.

2. Partition can be made only by tenants in common who are seized of the freehold, and not by those in remainder or reversion.

Wood v. Sugg, ante, 93.

(*Fagan v. Walker*, 5 Ired., 634; *Wilson v. Arentz*, 70 N. C., 670; *Lyon v. Akin*, 78 N. C., 258; *Williams v. Lanier*, Busb., 30; *Has-sell v. Mizell*, 6 Ired. Eq., 392; *Maxwell v. Maxwell*, 8 Ired. Eq., 25, cited and approved.)

PETITION for partition, heard on appeal at Fall Term, 1883, of CLEVELAND Superior Court, before *Gilmer, J.*

The plaintiffs brought this proceeding to compel partition of the land described in the petition. It is alleged in the petition that the *feme* plaintiff and the *feme* defendant are seized in fee as tenants in common of the land. This the defendants deny in their answer, and aver that partition of said land has been made by mutual consent.

The facts agreed upon and submitted to the court below are, in several respects, very indefinitely stated in the record. It appears, however, with tolerable certainty, that the *feme* plaintiff intermarried with her co-plaintiff shortly before she was twenty-one years of age, and before the year 1844, and had issue of the marriage born alive, and that she was seized in fee as tenant in common with the *feme* defendant, (her sister) of the lands specified in the petition, at the time of and since her marriage.

The *feme* defendant likewise intermarried with her co-defendant some time before she became twenty-one years of age, and before the year 1844, and had issue of the marriage born alive, and she was seized in fee, as tenant in

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common with the *feme* plaintiff, (her sister) of the same lands at the time and since her marriage.

Soon after the marriage of the plaintiffs they settled themselves upon the southern part of said land, and continued to live thereon until the spring of 1858, and the defendants, soon after their marriage, settled themselves upon the northern part thereof, and continued to live thereon until the spring of 1858.

On the 28th of March, 1858, the plaintiffs and defendants made a verbal agreement to divide the land, and commissioners and a surveyor for that purpose were selected by their mutual and common consent, and they made division thereof by metes and bounds, assigning to the plaintiffs the southern part, and to the defendants the northern part thereof; and the plaintiffs, on the 8th day of April, 1858, executed to the defendants a deed, conveying in form the fee, their interest in the part of the land so allotted to the defendants; and the defendants, on their part, executed a like deed, conveying in form the fee to the plaintiffs, their interest in the land so set apart to them.

The parties respectively made considerable improvements upon the land so divided, and acquiesced in such division until the institution of this proceeding.

Both the *femes covert* signed the deeds respectively as mentioned above, but neither of them was ever privily examined touching the execution of the same by her.

The clerk of the superior court, upon the hearing of the matter before him, awarded an order of partition, and from this judgment the defendants appealed to the superior court in term; in that court, the order of the clerk was affirmed, and the case remanded, and from this order the defendants appealed to this court.

Messrs. Gidney & Webb, and Cabiness and Hoke & Hoke, for plaintiffs.

No counsel for defendants.

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MERRIMON, J., after stating the above. It will be observed that the marriage of the plaintiffs and that of the defendants took place before the statute of 1848 (THE CODE, § 1840), and it does not therefore affect any right of the husband of the *feme* plaintiff or that of the husband of the *feme* defendant, in respect to any interest each may have in the real estate of his wife by virtue of the marriage. That statute, by its terms and effect, applies only to marriages that have occurred since the third Monday of November, 1848.

As the plaintiffs intermarried prior to the year 1848, and there were children of the marriage born alive, and the *feme* plaintiff was seized during the marriage of the land described in the petition, the husband, the male plaintiff, became tenant by the courtesy *initiate*. He had a life estate in the lands, in his own right, that might be sold under execution, or he might sell and convey by deed of bargain and sale.

The same may be said as to the defendants, and the right of the male defendant. He also was tenant by the courtesy *initiate*, and had power to sell and convey his life estate in the land just as he might convey the title to any land he might acquire by purchase. *Fagan v. Walker*, 5 Ired., 634; *Wilson v. Arentz*, 70 N. C., 670; *Lyon v. Akin*, 78 N. C., 258; *Williams v. Lanier*, Busb., 30.

Granting that the deeds signed by the *feme* plaintiff and the *feme* defendant respectively, on the 8th day of April, 1858, in pursuance of a verbal agreement to divide the land, was void, because they were not privily examined, nevertheless, as the husbands, each had a life estate in the land, it was competent for them to make the division that was made, to last, at least, until one of them should die; and the deed each of them executed to the other operated to pass his title as it purported to do.

The division of the land as to them was binding, and

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each is estopped by his deed to deny the division made by them and the right of the other in respect thereto.

The *feme* plaintiff and the *feme* defendant are not entitled to have partition of the land pending the life estate of their respective husbands. Partition can only be made by tenants in common who are seized of the freehold, and not by those who have the remainder or reversion. Ordinarily, partition lies only in favor of one who has a seizin and right of immediate possession. *Hassell v. Mizell*, 6 Ired. Eq., 392; *Marwell v. Marwell*, 8 Ired. Eq., 25; *Wood v. Sugg, ante*, 93; 1 Wash. Real. Pr., 583.

There is error. The superior court in term ought to have disaffirmed the judgment of the clerk of that court awarding the order of partition, and directed the proceeding to be dismissed. The judgment of the superior court must be set aside and judgment entered there, setting aside the judgment of the clerk of that court and directing the clerk to dismiss the proceeding.

To that end, let this opinion be certified to the superior court. It is so ordered.

Error.

Reversed.

JAMES HOWELL and others v. WILLIAM M. TYLER, Executor.

*Construction of Will—Illegitimate Children, right to take under—
Executors and Administrators.*

1. A testator, among other things, provides as follows: "What is yet remaining, not above disposed of, shall be held and disposed of for the benefit of M.'s heirs, by my executor, or in such manner as he may think just and proper;" *Held*, that the concluding

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words enlarge the discretion of the executor, but the power exercised must be "for the benefit" of the heirs, and not to dispose of the estate so as to divest himself of the attaching trust.

2. Where a bequest is immediate—not dependent upon a preceding limited estate—to the heirs of a living person, and the children of such person are illegitimate; *Held*, they have the right to take, under the act which declares that a limitation to the "heirs" shall be construed to be the "children" of such person, unless a contrary intention appears. THE CODE, §1329. The ruling in *Thompson v. McDonald*, 2 Dev. & Bat. Eq., 463, commented on.
3. "I give to the children of my brother William and my sister Martha one-half of all the money on hand at my death," taken in connection with other provisions in the will, authorizes a distribution of the fund in equal parts between the children of his brother and the children of his sister, so as to carry out the intention of the testator. The general rule is that such limitations will be held to be *per capita*, but the rule will yield whenever a different intention is indicated.
4. The sale of the land of the testator by the executor and his purchase of the same through an agent is a nullity.
(*Thompson v. McDonald*, 2 Dev. & Bat. Eq., 463; *Kirkpatrick v. Rogers*, 6 Ired. Eq., 130; *Waller v. Forsythe*, Phil. Eq., 353; *Adams v. Adams*, 2 Jones Eq., 215; *Bryant v. Scott*, 1 Dev. & Bat., 155, cited and approved.)

SPECIAL PROCEEDING commenced before the clerk for an account and settlement of the estate of William Tyler, deceased, and heard at Fall Term, 1882, of GRANVILLE Superior Court, before *Shipp, J.*

The case involves the construction of a will. The defendant appealed from the ruling and judgment of the court below.

Mr. T. B. Venable, for plaintiffs.

Mr. M. V. Lanier, for defendant.

SMITH, C. J. In the will of William Tyler, who died soon after making it, in July, 1870, is contained the following clause, numbered 3 :

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"What is yet remaining, not above disposed of, shall be held and disposed of for the benefit of Martha J. Trevan's heirs, by my executor hereafter to be named, or in such manner as he may think best and proper."

The testator left three children, to-wit, Alfred, whom he appoints his executor, and who is the testator of the defendant William; the defendant William, and Martha, then married, who had no children born in wedlock, but had four illegitimate children, the plaintiffs Elizabeth Howell, Amanda Tyler, Hawkins Tyler and Frances Richardson, the youngest of whom was then twelve years of age.

Alfred Tyler administered upon his father's estate, but died without settling it, in February, 1874, having made a will wherein he appoints his brother William (the defendant) executor, and makes the following dispositions of property:

Item 2. I give to the children of my sister Martha Trevan all that portion of my father's estate given me for her support.

Item 3. I give to the children of my brother William and my sister Martha one-half of all the money on hand at my death.

The proper construction of these several testamentary dispositions and the effect to be given to them, passed upon in the superior court, are brought up for revision by the defendant's appeal.

1. The first inquiry is as to the power and interest vested in the executor Alfred under the concluding clause of the bequest for the benefit of Martha Trevan's heirs, "or in such manner as he may think best and proper." The preceding words are that the fund "shall be held and disposed of for the benefit" of the heirs of his daughter by the executor, and then follows the language recited.

It is manifest, if we regard the entire clause, that the testator never meant to take away from the beneficiaries what

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was to be held and managed for them, or leave it in the power of the executor to dispose of the legal estate, so as to divest himself of the attaching trusts and deprive them of any interest in the property itself, and in that for which it may have been exchanged. The purpose was to enlarge the discretion reposed in the executor, to be exercised however for their benefit, when exercised at all. It may have been needless to add these words, since he had been already clothed with the power of disposing of the property, but it would be a perversion of the testator's words, when this power was given and to be used *for the benefit* of the heirs, to attribute to them a meaning which effectually neutralizes the trusts, and gives him the property divested of them. The clause must be so interpreted as to produce harmony in its parts, and this requires the construction suggested.

2. The next inquiry is whether the plaintiffs, illegitimate children of Martha, she having had none others, can take under the terms of the bequest of her heirs.

The bequest is immediate and direct, not dependent upon a preceding limited estate, and unless these natural children are intended, the gift fails for want of a donee or recipient. The word used must be understood as synonymous with the word children for the statute expressly declares that a limitation "to the heirs of a living person shall be construed to be to the children of such person," unless a contrary intention appear in the writing, and none such does appear here. THE CODE, § 1329.

So, inasmuch as, in the absence of children born to the mother in wedlock, those of illegitimate birth can inherit from the mother and thus become her heirs, these plaintiffs are sufficiently designated by the term which describes that relation.

Assuming then that "heirs" means "children," must these latter be legitimate to be embraced in the donation?

Two cases are cited as supporting the proposition that a

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bequest to children of a person, without further explanation, is a bequest to children that are legitimate, and fails if there are none such. In *Thompson v. McDonald*, 2 Dev. & Bat. Eq., 463, the bequest was to two sisters, naming them, with a limitation that if either should die without a child or children living at her death, "the whole should survive to the surviving sister, her heirs and assigns." One of the sisters died without ever having been married, but leaving a daughter born out of wedlock and before the making of the testator's will. It was decided, GASTON, J., delivering the opinion, that legitimate children were meant, and the surviving sister took the entire estate.

The limitation here was upon a distant and contingent event, and as illegitimate children in the eyes of the law, are not the children of any one, *nullius filius*, they were not comprehended in the term used. It is not necessary to question the correctness of this rigid rule of testamentary interpretation, which seems to ignore to some extent the inquiry as to what the testator intended in using the word, since there was nothing in that case to explain the sense of the testator or to qualify the legal principle that such children have no parent and cannot be designated by a relation they do not sustain.

The opinion is put upon the ground that it is not a present but a *prospective disposition*, and it proceeds thus: "Now, without deciding upon the effect of a bequest explicitly made to the children which a woman may have, whether legitimate or natural, or upon the effect of a limitation in case a woman should not leave living at her death any child, whether legitimate or natural, it is enough to say," &c., evidently conceding that an expressed intention to include a child of either class would entitle the natural child to share in the bounty.

The other case, *Kirkpatrick v. Rogers*, 6 Ired. Eq., 130, sustains the same proposition, and, as there were children of

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each class, confines the bequest to the legitimate in exclusion of the natural children.

But a more general and fundamental rule, underlying all others, is to look at the whole instrument in the light of the surrounding circumstances when it was made, and see, if we can, in what sense the testator used the word, for his intent must prevail over any legal mode of construing it when there is antagonism. The testator knew that his sister had then illegitimate and no legitimate children, and that the former could under such circumstances inherit from their mother, and the bequest operates at once upon persons *in esse* at his death, or not at all. Could he have intended a present benefit to persons who did not then exist and might never come into being? Or did he mean to convey a present benefit to some legatees, and can any others be meant except the natural, who were in fact, however under technical rules of law they were not, *children* of his sister?

We think the testator intended the benefit of this bequest to the plaintiffs, and that by the word "heirs" he meant the children and in this sense employed it, though they were natural, in pointing out the beneficiaries.

3. In the next place—Who take and in what shares under the clause in Alfred's will? "I give to the children of my brother William and my sister Martha, one-half of all the money on hand at my death." This item is susceptible of two interpretations, one as making a division between the children of William and the children of Martha, forming an aggregate body; the other, as making a division between the children of William and Martha herself.

In *Waller v. Forsythe*, Phil. Eq., 353, the limitation was, after the death of the testator's wife and daughter, or intermarriage, "to be equally divided between the children of the said Nancy Waller and my sons, William and John;" and it was construed to be a division *per capita*, each of the children of Nancy sharing equally with William and John.

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On the other hand in *Adams v. Adams*, 2 Jones Eq., 215, where the disposition of the residuary estate was that it be "equally divided between the children of my brother, Jahleel Smith Coila and my sister Nancy Amanda Adams," the words were construed as giving an equal share to the children of both the brother and sister. This construction was put upon the language and its meaning ascertained by looking into the other provisions of the will.

Pursuing the same course, it will be seen that William has all the land except the one-fourth in value upon which Martha may live and have an annuity from him of a sum not above \$50 nor less than \$30, to cease when the value is exhausted, but if not exhausted at her death, the residue to go to her children.

The testator then gives the defendant one-half of the money on hand at his death, and the other half as in the recited clause under consideration. The defendant has thirteen children, and if each shares with Martha, William and his children will get 27-28ths or nearly the whole of the money, a distribution not at all consonant with the previous dispositions of his estate. Following the ruling in *Adams v. Adams*, we are compelled to declare that the testator intended, and such is his expressed purpose in this clause, to distribute the fund in equal parts between the children of William and the children of Martha, as if this had been the form of expression used, prefixing the word "children" to both names.

In a note appended to *Bryant v. Scott*, 1 Dev. & Bat. Eq., 155, in the edition issued under the supervision of the late Judge BATTLE, he lays down the rule, which runs through the many adjudicated cases and distinguishes them, to be generally that such limitations will be held to be *per capita*, but if there be a different intent indicated and that the division must be *per stirpes* or in another way, the general rule will yield to the evidence thus furnished of a different intent. The cases are collected in the note.

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4. We concur in the rulings of the court numbered 3, 4 and 5, all of which result from the invalidity of the attempted sale by Alfred of the land of the testator and his own re-purchase through the agency of his son; and this being a nullity, no funds are thence derived to constitute assets in his hands. The only effectual method of sale to convert real estate into funds to be used in a course of administration is by suit against the heirs or devisees in whom the estate is vested, unless the devise or descent was to the personal representative alone, and then as sole owner he could dispose of it by his own act. But even in such case he could not make a sale to himself, and would hold as if none had been attempted.

There are other questions made in the record which do not seem to have been passed on in the court below, and the complaint is that they were not, but as our revising jurisdiction on appeal is restricted to the erroneous rulings made, we do not enter upon a consideration of the others.

The cause must be remanded to be proceeded with according to law as declared in this opinion.

No error.

Remanded.

C. AUSTIN v. S. M. SECREST.

Rule regulating the right to open and conclude—Discretionary Power—Evidence, production of papers—Judgment in Claim and Delivery.

1. Rule 6 (89 N. C., 609) regulating the practice in the superior courts, commits the order of argument—and this embraces the matter of introducing evidence—to the discretion of the presiding judge, whose decision is not reviewable on appeal.

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2. The production of papers containing evidence relating to the merits of an action will be ordered by the court; and when produced, they are competent evidence for all legitimate purposes.
3. Where claim and delivery is brought to get possession of property for the purpose of selling it, according to the terms of a contract, to pay an indebtedness, and all parties interested are before the court and the amount due ascertained, the plaintiff upon recovering holds as a trustee, and a judgment, directing an adjustment of all the equities involved in order that the matter may be determined, is the proper one to be rendered; and if possession of the property cannot be had, then the judgment should be in the alternative.

(*Com'rs v. Lemly*, 85 N. C., 341; *McLeod v. Bullard*, 84 N. C., 515; *Otten v. Willoughby*, 83 N. C., 75, cited and approved.)

CIVIL ACTION, tried upon exceptions to a referee's report, at August Special Term, 1884, of UNION Superior Court, before *MacRae, J.*

The defendant appealed from the ruling and judgment of the court below.

Messrs. Payne & Vann, for plaintiff.

Messrs. Covington & Adams, for defendant.

SMITH, C. J. The parties to this action on the 16th day of September, 1879, entered into an agreement under seal, whereby the plaintiff sold to the defendant a steam saw mill, with its fixtures, and certain other enumerated property, for the sum of twenty-six hundred dollars, to be paid in lumber to be delivered at the site of the mill, and thereupon the latter executed his thirteen several promissory notes, each in the sum of two hundred dollars, payable successively on the same day of the months following, the last falling due in October of the next year.

The title to the property was to remain in the plaintiff until all the purchase money was paid, while the defendant was to have possession in order that the lumber might be

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sawed and delivered; and the covenant contains also a clause that on the defendant's failure to pay any of the notes as they become due, the plaintiff may enter upon the premises and take possession of the property and proceed to advertise and dispose of the same at public sale for cash, applying so much of the moneys thence arising as may be required in discharge of such of the notes as were overdue, and retaining of the residue a sum sufficient to meet the others as they may mature.

The defendant accordingly took possession of the property, and has delivered large quantities of lumber to the plaintiff at various times, sufficient, as he alleges, to pay off all the notes; while the plaintiff insists that he has not, and accordingly institutes this suit, on the 13th day of June, 1882, under the provisions of the Code of Civil Procedure, chapter 111, sections 176 to 187 inclusive, to recover possession of the said mill and fixtures, and three log carts.

The property was accordingly seized by the sheriff, but restored to the defendant on his giving the undertaking prescribed in section 181.

The only issue being as to the deliveries of lumber and its value towards the discharge of the indebtedness, an order was entered in the cause at spring term, 1883, in these words: "Referred to clerk to take and state an account between the parties under THE CODE."

The referee made his report at the next term, accompanied with voluminous evidence taken before him, and states the account, finding to be due the plaintiff on June 12th, 1883, the balance of five hundred and ninety-nine dollars and thirty-five cents, to which he adds interest thence accruing to the first day of the term.

To the report the defendant filed exceptions which, with the rulings of the court thereon as brought up on the defendant's appeal, we now proceed to examine.

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The first three exceptions are to the referee's refusal to allow the defendant to begin and end the trial before him, both in the introduction of evidence and in argument, and permitting the plaintiff to exercise this privilege before him.

This objection is disposed of in a rule adopted at October term, 1883, regulating the practice in the superior courts, which commits the order of the argument of counsel to the discretion of the presiding judge without a right of appeal from his decision. This embraces the subordinate matter of introducing the proof.

The rule applies with more pertinency and force to proceedings before a referee, and where there is no jury, inasmuch as the entire evidence is taken and reported in written form to the court at one and the same time. For these reasons, and that further assigned by the court that no prejudice appears to have been done to the appellant in the mode pursued in conducting the reference, we sustain the ruling of the court that the exceptions are not tenable.

2. The next exception numbered 7 in the series is to the inquiry made of the witness V. C. Austin, a son of the plaintiff, who acted on his behalf mostly in the deliveries of the lumber, whether he had personal knowledge of all the transactions between the defendant and himself touching the receipt of the lumber, as being vague and indefinite in its terms.

We cannot appreciate the force of the objection. The question is near the close of a long, minute and exhaustive examination of the witness, and seeks to elicit a general statement that all the matters between the parties developed upon such examination rested within his personal knowledge, and none was derived from mere information communicated by others.

In overruling this exception there is no error.

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3. The next exception, numbered 10, is taken to the order requiring the defendant, while on the witness stand undergoing a cross-examination, to produce the notes and statements in his possession and permitting them to be used for any purpose other than that avowed by defendant, to contradict the witness for the plaintiff.

These papers furnished material information upon the inquiry before the referee, and showed transactions between the parties directly bearing upon the controversy.

Their production could therefore be coerced as they were present and in possession of the defendant. THE CODE, §§ 578 and 1373.

Referring to these provisions as found in the Code of Civil Procedure, § 331, and the Revised Code, ch. 31, § 82, RUFFIN, J., delivering the opinion in *McLeod v. Bullard*, 84 N. C., 515, says:

"Under these two statutes, the courts have been wont to require the production of every document containing evidence relating to the merits of an action, *whenever the justice of the case seemed to require it.*" *Commissioners v. Lemly*, 85 N. C., 341.

And it is not less clear that where the papers are produced the defendant cannot restrict the uses to which the evidence they furnish may be applied. They are competent for all legitimate purposes.

4. The exception numbered 19 rests upon an alleged absence of evidence, and that numbered 20, upon an alleged insufficiency of evidence to support the referee's estimate of the quantity of lumber delivered and charged as payments on the debt.

The information upon which his calculations are based comes mainly from the testimony of the plaintiff's agent, V. C. Austin, who acted in the premises for his father, and the defendant himself, (which is in detail but conflicting), and from memoranda made of the transactions. The report

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itself shows upon what evidence the result was arrived at, and there certainly was *some evidence* to sustain the finding, the only point we can consider, for its effect in producing belief belongs exclusively to the court below.

The 22nd exception is but the correlative of that numbered 19 and rests upon an allegation that while the referee ought not to have found 250,078 feet of measured lumber as the quantity to be charged, upon the proofs, he ought to have found the quantity to be 325,521 feet. This need not be further considered.

5. The last exception upon the coming in of the supplementary report upon a re-reference of matter involved in a single exception is also untenable. The inquiry was directed in regard to a small lot of lumber left in some uncertainty upon the first report, and the referee reviews the evidence and his former finding, stating that this lot of lumber is included in a larger lot, 49,903 feet, and forms an item or credit in the account rendered by him.

We find upon this review no error in the several rulings complained of, (many of the exceptions having been abandoned) and must affirm them.

The judgment however is not in proper form. The action is to recover possession of the property, for the purpose of selling it or so much of it as may be necessary to discharge the remaining indebtedness, according to the provisions of the original contract. This is the only use to be made of the articles when possession is restored, and the plaintiff (as was said in the case of *Cotten v. Willoughby*, 83 N. C., 75, in the conclusion of the opinion) "will hold as trustee, and as all interested in the fund are before the court, we see no reason why in the present proceeding the mortgage may not be foreclosed, the equities involved adjusted, and the whole matter finally adjudicated in the action." The relations of the parties here are substantially the same as in that case, and we see no reason for terminating the

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suit by a delivery of possession alone when the debt is ascertained and settled.

The judgment will be so drawn, and the cause will be retained, if possession is in fact restored, for further proceedings, and in the alternative if possession is not delivered, and as these further proceedings can be more conveniently conducted in the court below the cause is remanded to that end.

No error.

Reformed and remanded.

GEORGE B. ALBRIGHT v. JAMES W. ALBRIGHT and
others.

Trusts and Trustees—Account—Injunction and Receiver.

1 The grantor, reserving an estate for his own life, conveys land in trust, and provides in the deed that after his death the property is to be held for the use of his wife and grand-son George, and such child or children as may be born to the trustee (his son James), for and during the lives of his said wife and son; and at their death the land shall be equally divided between the said grand-son and such other children as his son may have born unto him; *Held*,

(1) That the trustee is liable to an account of the rents and profits, and the plaintiff grand-son is entitled to his share of the same during the lifetime of the trustee.

(2) If other children are born, they also share in the trust; and at the death of the son, the trustee, the number of all his children can then be ascertained, and the trust determines; and then the land is to be equally divided between the grand-son and such other children as may have been born unto the son.

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- (3) The trustee has no right, in the management of the trust estate, to allow the rents to accumulate and postpone the distribution, as the donor intended that current provision should be made for the beneficiaries.
2. Where one is entitled to an account or his right thereto admitted, the court will order it to be taken before trial of issues.
 3. The order for an injunction and receiver, upon the finding that the trustee in this case was insolvent and had misapplied the rents and profits, was properly granted.

MOTION for an injunction heard at Fall Term, 1883, of GUILFORD Superior Court, before *MacRae, J.*

The plaintiff moved for an injunction and the appointment of a receiver, and for an account of the rents and profits of the estate named in the deed of trust, which is sufficiently set out in the opinion of this court. His Honor sustained the motion and the defendants appealed.

Messrs. Scott & Caldwell, for plaintiff.

Mr. John N. Staples, for defendants.

MERRIMON, J. It appears that George Albright, deceased, in his life-time, executed two deeds of conveyance, one bearing date the 29th day of June, 1866, and the other the 9th day of January, 1867, whereby he conveyed to his son, the defendant James W. Albright, three lots of land of considerable value, situated in the town of Greensboro, for the purpose and upon the trusts therein provided and specified. The following is a copy of so much of each as provides and declares such trusts:

"*First*, for the sole and separate use of the said George Albright, the grantor, during his natural life; that is, the said George Albright retains a life estate in said lands. *Second*, after the death of the said George Albright, for the sole and separate use of Martha S. Albright, and George B. Albright grandson of said George Albright and son of said

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James W. Albright, and such child or children as are or may be born to said James W. Albright by his said present wife or any other, for and during the natural life of the said Martha S. Albright and James W. Albright, and at the death of James W. Albright and Martha S. Albright, his wife, then the said lands, with their improvements and appurtenances to be equally divided between the said grandson, George B. Albright, and such other children as the said James W. Albright has or may have born unto him. And upon the further condition, which is well understood and made particularly a part of this deed, that the said James W. Albright hath and is invested with full power and authority, with the approbation and consent of said George Albright, given in writing in his life-time, and after the death of said George Albright, when he, said James W. Albright, shall deem it best for all parties interested or concerned, to sell and convey the lands and improvements herein conveyed, and to purchase and receive for the consideration or purchase-money other lands or estate in the name and stead thereof, having a deed for the same made unto him containing the same provisions, conditions, and trusts which are contained and expressed in said deed."

The plaintiff George B. Albright, is the son of the defendant James W. Albright, and the *cestui que trust* of that name mentioned in that part of the deed set forth above.

The defendant Clara P. Albright, is the daughter of the defendant James (by his present wife the defendant Martha S.) and she and the plaintiff are his only children.

The court below, in construing the clauses of the deeds above specified, "adjudged that the plaintiff is entitled to his share of the rents and profits of the estate named in the deed of trust, during the life of his father James W. Albright, and Martha S. Albright, wife of James W. and step-mother of plaintiff; and that the amount of the plain-

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tiff's share is determined by the number of children born, or hereafter to be born to the said James W. Albright, and plaintiff's share is now one-third of said rents and profits."

The defendant trustee insists that such interpretation is erroneous.

The construction thus placed by the court upon the deeds creating the trust is substantially correct. The donor expressed his purpose too clearly to give rise to any serious question as to his meaning.

It is plain that he retained first, a life estate in the property conveyed, and secondly, the trustee having the legal estate is charged to hold and care for the property for the use and benefit of Martha S., his wife, the plaintiff George B. and such other children as are or may be born to James W. Albright, the trustee, for the period of the life of his wife and for his life. It is not intended, however, to give the trustee any beneficial interest, or his wife any interest to extend beyond the period of her life. The words "for and during the natural life of the said Martha S. Albright and the said James W. Albright," are employed to fix the limit of the period within which the wife shall share in the trust, and to limit the time that the trust shall remain operative, active and open as a trust, to let any children yet "to be born to him, James W. Albright," share in it. At the death of Martha S. her interest in the trust will cease; at the death of the trustee, the number of his children will have been ascertained, who are to share in the trust; and then the trust to cease and determine; and the property, the said lands, "with their improvements and appurtenances," shall be equally divided "between the said grandson, George B. Albright, and such other children as the said James W. Albright has or may have born unto him."

The donor manifestly intended to make some provision for the wife and all the children of his son James, and to have his son manage and control the property for, and only

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for that purpose. He expected and required him to take care of, use and improve it in a way and manner most expedient, and faithfully to that end while he should live; and having accepted the trust, he became obliged to do so. To this end, it is provided that the trustee might, with the approval of the donor while he continued to live, or after his death, in his own just discretion, looking to the "best interests of all the parties interested or concerned, * * * sell and convey the lands and improvements," conveyed to him, and receive and re-invest the purchase money in other lands suitable and appropriate, upon "the same provisions, conditions and trusts, as those contained in the deeds creating the trust."

It cannot be contended with the slightest show of reason, that the trust contemplates that the trustee shall manage the trust property, let the rents and profits accumulate until he shall die, and then let the same be divided equally among the *cestuis que trust*. Such a construction would defeat in large part the generous purpose of the donor to make current provision for his daughter-in-law and grandchildren. His meaning, as expressed in declaring the trust is, that the net rents and profits shall go to the use and benefit of the *cestuis que trust* continuously next after his death until the trust shall terminate, as we have indicated, such child as might be born after the trust became operative, sharing in the rents and profits from the time of his or her birth. When we say continuously, of course we mean as often and as rapidly as the rents and profits accrue in the orderly course of requiring rents for such property.

We see no reason why we shall disturb the findings of fact by the court upon the hearing of the application for an injunction pending the action, and a receiver. Indeed, it is not suggested that we shall do so. In view of these findings, we think the court properly granted the injunction, and directed that an account be taken. The admissions in

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the answer, taken in connection with the construction the court placed upon the deeds creating the trust, entitled the plaintiff to an account, without reference to issues of fact raised in the pleadings that do not put in issue the right to an account.

Where the right to an account is admitted in terms or effect, the court may at once order the same to be taken without waiting to try the issues of fact raised by the pleadings, if there be such.

The court finds as facts that the trustee is insolvent; that he has sold parts of the trust property and misapplied the proceeds; that he has never accounted to the plaintiff for the rents and profits, but has applied the same to his own use; and that he had proposed to sell other parts of the trust property within a short period before the application for the injunction and receiver. It is manifest that in such a case the trustee should be restrained, pending the action, from making further sales of the property. However large may be the powers with which the trustee is invested, they are all to be exercised only for the purpose of effectuating the trust; and when it appears that such powers are perverted to the detriment of the *cestui que trust*, the court will promptly interpose its protective authority.

Judgment affirmed. Let this be certified to the superior court according to law.

No error.

Affirmed.

RUSH v. STEED.

Z. F. RUSH v. B. W. STEED, Executor.

*Transaction with person deceased—Witness under section 590—
Hand-writing, proof of.*

A party interested in the event of a suit is not an incompetent witness, under THE CODE, § 590, to prove the *hand-writing* of the deceased person.

(*Peoples v. Maxwell*, 64 N. C., 313; *Halyburton v. Dobson*, 65 N. C., 88, cited and approved.)

CIVIL ACTION tried at July Special Term, 1884, of RANDOLPH Superior Court, before *Graves, J.*

The plaintiff alleged that in the year 1879, he borrowed two thousand dollars of James E. Macon, the defendant's testator, and conveyed a tract of land to him to secure payment of the same—the deed being in the nature of a mortgage; and that Macon agreed to reconvey on payment of the money, and, if he sold the land for more than sufficient to pay the debt and interest, he agreed to pay the surplus to plaintiff. Macon did sell to one Garner for \$2,250, and received the money, but failed to carry out his said agreement, though the plaintiff demanded the excess of Macon during his lifetime and of the defendant executor, after his death. And the plaintiff brings this action to recover the \$250 excess.

The defendant denied that his testator agreed to reconvey or pay the excess as alleged, and asked that the plaintiff be held to strict proof of his allegations.

The following issues were submitted to the jury:

1. Did the defendant's testator agree to pay the plaintiff the excess, as alleged?
2. If he did so agree, what is the excess, if any?

The plaintiff announced in open court that the said agreement was in writing, and introduced James T. Crocker.

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an attorney at law, to prove its execution. He testified that plaintiff came to his office in Asheboro and presented to him a paper writing having the names of both the plaintiff and the said Macon signed thereto; that he knew the plaintiff's hand-writing, and his signature was genuine, but he was not acquainted with that of Macon and could not testify as to his signature; that he returned the paper to the plaintiff and has not seen it since.

Whereupon the plaintiff was introduced as a witness in his own behalf, and testified that Mr. Crocker returned the paper writing to him; that he had lost or mislaid it; had made search for it, and used every effort to find it, and it could not be found.

The plaintiff then proposed to prove by himself that the name of James E. Macon to the paper spoken of by Mr. Crocker, and lost or mislaid, was in the genuine handwriting, and was the genuine signature of the said James E. Macon, deceased.

The defendant objected. Objection overruled and the defendant excepted.

The plaintiff then testified that he had often seen James E. Macon write, and knew his signature, and that the signature was in his proper handwriting.

Whereupon the plaintiff recalls Mr. Crocker, and proposes to prove by him the contents of the paper writing presented by the plaintiff to the witness, as stated above. The defendant objected on the ground that the signature of James E. Macon had not been proved to be genuine, in a legal manner, so as to authorize the introduction of proof of its contents. Objection overruled and the defendant excepted.

Mr. Crocker then testified that he thought he could state the entire substance of the paper writing; that it was an instrument relating to the sale of the Rush place, and provided that in the event the money, the consideration of the land, was repaid him, he would reconvey to the plaintiff,

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and if Macon sold the land for any sum over and above two thousand dollars, Macon was to pay to plaintiff the overplus.

There was a verdict for the plaintiff. The defendant moved for a new trial, assigning as a reason therefor error in the ruling of the court admitting the evidence of the plaintiff and the witness Crocker. Motion overruled. Judgment for plaintiff; appeal by defendant.

Messrs. Scott & Caldwell, for plaintiff.

Mr. M. S. Robins, for defendant.

ASHE, J. THE CODE, § 590, declares that, upon the trial of an action, a party interested in the event shall not be examined as a witness in his own behalf, against the administrator of a deceased person, concerning a personal transaction or communication between the witness and the deceased person.

A construction was given to section 343 of the Code of Civil Procedure (of which the above section of THE CODE is a substantial copy), in the case of *Peoples v. Maxwell*, 64 N. C., 313. It was an action upon the official bond of a constable against his administrator. The plaintiff relied upon a receipt given by the constable, and offered himself as a witness to prove the execution of the receipt by the defendant's intestate. He was objected to as incompetent, but was admitted by the court; and he testified that he knew the handwriting of the deceased, and that the signature in question was his, and that he saw the deceased sign it. There was a judgment in the court below for the plaintiff and the defendant appealed to this court, where it was held that it was not competent for the plaintiff to prove that the deceased constable signed the receipt in question. "He might prove the handwriting of the deceased from his general knowledge of it, but to prove that the deceased signed the particular

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paper was to prove a 'transaction' between the witness and the deceased, which was forbidden by section 343."

The distinction drawn in this decision is between proving the *handwriting* and proving the *actual signing* of the paper. The latter is held to be a "transaction," but the former not a transaction—to my understanding a very fine spun distinction, and, in its application to the execution of the instrument, borders very closely on a distinction without a difference. But it is so decided, and the decision has not only had the approval of the court (*Halyburton v. Dobson*, 65 N. C., 88), but the legislature seems to have recognized the distinction by inserting in section 590 of THE CODE, the word "*personal*" before the word "*transaction*," which is not contained in section 343, C. C. P. This amendment of that section was most probably induced by the decision in *Peoples v. Maxwell*.

In the case before us, the plaintiff did not prove that he *saw* the defendant *sign* the agreement, but only that the signature to it was the *hand-writing* of the defendant's testator, which brings the case within the exception mentioned in *Peoples v. Maxwell*. Upon the authority of that case, we are constrained to hold that there was no error, and the judgment of the superior court is therefore affirmed.

No error.

Affirmed.

 THOMAS F. ANTHONY v. THOMAS W. CARTER.

Appeal Bond, justification of.

An appeal bond must be accompanied by an affidavit of one of the sureties that he is worth *double* the amount specified therein (*Tur-*

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ner v. Quinn, ante, 92). Though the justification of two sureties may be equal to double the amount of the undertaking, yet it is not a compliance with the statute, which is peremptory, and the court cannot disregard it.

(*Lytle v. Lytle*, 90 N. C., 647, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1884, of ALLEGHANY Superior Court, before *Gilmer, J.*

The action was brought against the defendant for breach of an alleged contract entered into by the defendant to account to the plaintiff for the rents and profits of the land described in the complaint.

The case having been at issue on the pleadings, a motion was made by the plaintiff to have a reference for an account. The defendant resisted the motion, but it was granted, and the case referred. From the order of reference the defendant appealed, and the appeal bond was fixed by the court at fifty dollars.

The bond filed was as follows: "We, the undersigned, do hereby bind ourselves, our heirs, &c., in the sum of fifty dollars to the plaintiff in this case, to be void on condition that Thomas W. Carter pay all costs that may be adjudged against him in the supreme court of North Carolina, because of this appeal." (Signed and sealed by J. M. Gambill and J. H. Doughton.)

[Justification.] "We being sworn, each states that he is worth fifty dollars over and above his homestead and personal property exemption and liabilities." (Signed by Gambill and Doughton, and sworn to before the clerk.)

There was a motion to dismiss the appeal upon the ground that the bond was not justified according to law.

Messrs. Watson & Glenn, for plaintiff.

Messrs. Battle & Mordecai, for defendant.

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ASHE, J. THE CODE, § 560, declares that "an undertaking upon an appeal, *shall be of no effect* unless it be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein."

Here, there are two sureties, and neither justifies in double the amount specified in the undertaking, though each does swear that he is worth the amount of the undertaking after deducting his exemptions, &c., and the justification of the two is equal to the double the amount of the undertaking. But that is not a compliance with the statute. And the statute is so peremptory that we do not feel at liberty to disregard its express requirements. The court so held in *Lytle v. Lytle*, 90 N. C, 647. The appeal must be dismissed.

Appeal dismissed.

C. J. COWLES v. H. W. HARDIN and others.

Evidence to establish lost deeds.

1. The private act of 1873 to restore the records of Watauga county, which were destroyed by fire, is not a repeal, but in aid of the common law rules for establishing lost deeds, and a party may elect to proceed under either mode.
2. Where a deed in such case is proved to have been destroyed, the contents, probate and registration thereof may be established by secondary evidence, and the register of deeds is a competent witness to prove its destruction, contents, &c.

(*Bason v. Mining Co.*, 90 N. C., 417; *Dumas v. Powell*, 3 Dev., 103; *Baker v. Webb*, 1 Hay., 43, (55); *Nicholson v. Hilliard*, 2 Murp., 270; *Freeman v. Hatley*, 3 Jones, 115, cited and approved.)

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EJECTMENT, tried at Spring Term, 1883, of WILKES Superior Court, before *Graves, J.*

The plaintiff claimed that he was the owner of forty-five acres of land as described in the complaint, embraced in two grants, one for twenty-five and the other for twenty acres. And as to the twenty-five acre tract he alleged that it had been granted to one Holdsclaw, and by him conveyed to one Cousins, and from Cousins he proposed to show a regular chain of title to himself.

He also alleged that the deed from Holdsclaw to Cousins had been duly registered, and that the deed and the book in which it was registered had been destroyed by fire. He tendered as a witness one Presnell, the present register of deeds for Watauga county, where the land is situate, and where this action was originally commenced, who stated he had been register of deeds for Watauga county for many years, and was proceeding to prove these facts when objection was made by the defendants. His Honor ruled that the plaintiff could not prove by oral testimony that said deed had been duly proved and registered. The plaintiff's counsel stated that as the deed and registration thereof were destroyed by fire when the court house was burned, it was impossible for him to produce any other evidence of these facts; but His Honor ruled that the plaintiff must proceed under a certain private act of assembly for Watauga county, passed in 1873, relating to the destruction of the records of that county.

In deference to this opinion, the plaintiff submitted to a judgment of nonsuit and appealed.

No counsel for plaintiff.

Mr. D. G. Fowle, for defendants.

ASHE, J. His Honor seems to have fallen into the error in holding, that the act of 1873, passed for the purpose of

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restoring to the county of Watauga the records which were destroyed by fire, was a repeal of the common law rules for establishing lost deeds, such as had been destroyed by time or accident. We have no idea the legislature had any such intention in the enactment of that statute. Instead of repealing the common law in such cases, it was intended to be in aid of the common law, *Bason v. Mining Co.*, 90 N. C., 417, so as to enable those, among others, whose evidences of title to real property had been destroyed, instead of relying upon the slippery memory of witnesses whose testimony may be lost in a few years in a course of nature, to have the means of perpetuating the muniments of their titles.

A party, whose deed with its registration had been destroyed, had his election to proceed to have his burnt deed again made a matter of record, by complying with the provisions of the act of 1873, or to depend upon the rules of the common law to establish the contents of his deed, when an occasion might arise that made it necessary for him to produce it in evidence. When a deed is lost or destroyed, there is no question its loss and contents may be proved by secondary evidence; but in all cases the best evidence, of which the nature of the case will admit, must be produced—a copy, for instance, if there be one, but if none, then parol evidence of its contents may be given. *Dumas v. Powell*, 3 Dev., 103; *Baker v. Webb*, 1 Hay., 43 (55); *Nicholson v. Hilliard*, 2 Murp., 270.

If a party, as is decided by these authorities, upon proof of the loss or destruction of a deed, may establish the contents by secondary evidence, it would seem to follow, as a necessary corollary, that he might also prove its registration, as without registration it could not be offered in evidence.

The case of *Freeman v. Hatley*, 3 Jones, 115, is an authority for this position. That is an analagous case. There, as here, the court house and register's books of Montgomery

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county had been burned, and on the trial it became necessary for the plaintiff to introduce, in support of his title, a deed from one Carson to William Thornton. The plaintiff, as in this case, had recourse to secondary evidence, and introduced a copy of the deed with the certificate of the register endorsed that it was a true copy, and that the original deed had been duly registered in said county. The objection was there raised by the defendant that this was no evidence that the deed had ever been proved or acknowledged. Thereupon the plaintiff introduced the register as a witness, who testified that he was register at the date of the deed, and had been ever since, and that he had never registered a deed unless it had been proved. This court, in the opinion delivered by Chief Justice PEARSON, recognized the testimony of the register as competent. He said: "We have come to the conclusion that the proof set out above, with the aid of the maxim *omnia præsumuntur*, &c., is sufficient to show that the original deed had been duly proved and registered. From the fact of its having been registered and the *oath* of James M. Lilly, who, fortunately for the plaintiff, has been register during the whole time, we think there is a clear presumption (the loss of the deed having been satisfactorily established) that it was proved and ordered to be registered."

If the register is a competent witness to prove the probate of the deed, there can be no reason why he is not also competent to prove its registration.

When secondary evidence is resorted to for proof of an instrument which has been lost or destroyed, there must, in the first place, be some evidence that the instrument once existed, though slight evidence is sufficient for that purpose; then, if lost, that diligent search has been made for it without success; but if destroyed, proof of the destruction is sufficient. And, ordinarily, the party who proposes to use the instrument in deduction of his title must prove the loss

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or destruction by his own affidavit, unless the instrument at the time of its destruction was in the custody of another, and then it must be proved by him who was the depositary of it at the time of its destruction. After such proof is offered to the court, and not till then is evidence admissible of its contents, its execution and registration. But the execution will be presumed from the registration, as was held in *Freeman v. Halley*, *supra*, upon the maxim *omnia præsuntur rite acta esse*, especially where there is other evidence tending to the same end.

In the case before us, the plaintiff proposed to prove by the register of Watauga county that the deed from Holdscow to Cousins, under which he claims title, together with the book in which it was registered, had been destroyed by fire. The evidence is certainly competent. If the deed when registered was left in the register's office, as is often the case, the register was the proper person to prove its destruction and its registration; and it may be, the plaintiff relied upon his testimony to prove the contents. But however that may be, we are of opinion that His Honor acted prematurely in sustaining the objection of the defendants; otherwise the witness Presnell may have been able to prove all the facts which were necessary for the plaintiff to supply the absence of the deed.

There is error. This opinion must be certified to the superior court of Wilkes county that a *venire de novo* may be awarded.

Error.

Venire de novo.

TERRY v. RAILROAD.

B. & J. K. TERRY v. DANVILLE, MOCKSVILLE AND SOUTH-WESTERN RAILROAD COMPANY.

Contract, evidence of—Judge's Charge—Correct verdict upon questions of law, cures error of court—Instructions must be asked upon points omitted.

1. Where a writing does not contain the *entire* contract between the parties, parol evidence of an independent verbal agreement is admissible. The written contract, here, to pay for work on defendant's railroad *after* the grade was lowered, has no bearing upon the issue as to how much the plaintiff is entitled to recover for work done under a verbal contract *before* the grade was lowered.
2. The rule, that an omission of a judge to charge the jury upon a particular point is not error unless asked to do so, is still the law, notwithstanding the provision of THE CODE, § 412 (3) which is in effect that the error alleged need not be put in writing, and may be taken advantage of at any time, even in this court.
3. Where a jury decide correctly a question of law improperly left to them, the verdict cures the error of the court. The legal question of negligence was properly decided by the jury in this case.

(*Doughtry v. Boothe*, 4 Jones, 87; *Manning v. Jones*, Busb., 368; *Twidy v. Saunderson*, 9 Ired., 5; *State v. O'Neal*, 7 Ired., 251; *Brown v. Morris*, 4 Dev. & Bat., 429; *Hice v. Woodard*, 12 Ired., 293; *Arey v. Stephenson*, *Ib.*, 34; *Lawton v. Giles*, 90 N. C., 374; *Glenn v. Railroad*, 63 N. C., 510; *Smith v. Shepard*, 1 Dev., 461. cited and approved.)

CIVIL ACTION, tried at Fall Term, 1883, of ROCKINGHAM Superior Court, before *MacRae, J.*

This action was brought on a special contract for work and labor done on defendant's road.

The plaintiffs offered evidence of the following facts, which were not disputed, that the Midland railroad company, and the Danville, Mocksville and Southwestern rail-

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road company were building railroads through the county of Rockingham. The defendant's road, being a narrow gauge, crossed the Midland road twice; and by an agreement between the two companies the defendant was permitted by the Midland company to change a part of the Midland line in order to avoid the necessity of crossing twice, and it was agreed between the companies that the defendant company should pay for all the work upon that portion of the line, over and above that which the Midland should have to pay to carry it as they had proposed.

The engineer of the defendant company then proposed to change the grade of that portion of the line, and make it a lower grade than the Midland had fixed upon. This the Midland company agreed to, with the express agreement that the defendant must pay for the change of grade. And it was agreed by the defendant company that the Midland contractors should go on and do the work, and the defendant should pay for it.

The plaintiffs were the contractors on the Midland road. And they offered evidence to establish the further facts that the defendant company contracted with them verbally in July, 1881, to do the work which was necessary to effect the change in the line of the Midland road, and they were directed by the defendant's officer to go on, when they got to the point where the change was to be commenced, and do the work; that they did go on with the work according to the pegs or stakes which were set there by the Midland engineers, and when they had done a great part of the work the defendant changed the grade, reset the pegs, and required a large amount of work to be done, which would not have had to be done, if the pegs had been set for the change of grade before the plaintiffs commenced work.

They offered evidence showing that when they reached the point where the defendant's work was to begin, and after working a few days, they were informed that the de-

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fendant intended to change the grade; that they stopped work until they saw the engineer of the defendant, who looked at the work and told them to continue the work and he would lower the grade. He neglected to lower the grade, and they told him that they could not do the work and make the haul at sixteen cents, but would do it at the price his contractors charged, to-wit, twenty cents, and he agreed thereto.

The plaintiffs and defendant then entered into the following written agreement: "August 11th, 1881. Memorandum of an agreement between B. K. and J. K. Terry, and D. M. and S. W. railroad, whereby the said B. K. and J. K. Terry agree to move all earth and rock from the cut between stations 1651 and 1667, and deposit the same on the embankment just westerly of said cut, and for said work the D. M. and S. W. railroad agree to pay the following prices upon the completion of the said work. For earth excavation 20c. per cubic yard; soft rock excavation 35c. per cubic yard; hard rock excavation 85c. per cubic yard. And in addition to the above prices there shall be paid for each yard hauled over 500 feet one cent per cubic yard for every 100 feet over 500 feet."

It was also in evidence that the road was then staked off, and it appearing that there would necessarily be "borrow and fill" the defendant agreed to pay for it; that they had completed the "fill" all but 1,200 yards before the defendant changed the grade, and a change of price was agreed upon between them and the defendant, for the work already done at 20c. per cubic yard, and the defendant promised to pay for it; the delay on the part of defendant to lower the grade caused them to do much unnecessary work, but that it was not their fault and was the fault of the defendant; the unnecessary work done in consequence of the delay of defendant in lowering the grade was worth some fourteen hundred dollars; that an estimate of the work done under

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the written contract was made by the engineer of the Midland road at eight hundred dollars, and that it was correct as far as it went, but the estimate did not include the work the plaintiffs had put up and had to take down in consequence of the change in the grade, and that the defendant's engineer made an estimate at six hundred dollars.

The defendant contended that the only contract made between it and the plaintiffs was the written contract of date August the 11th, 1881, and it was only liable for the necessary amount of work done by the plaintiffs to effect the change in the line, which the defendant was to pay for, and that was less than six hundred and fifty dollars, but the defendant company was willing for a verdict and judgment to go against it for that amount and no more.

His Honor charged the jury that "if it was by the negligence of the plaintiffs that they went on and did an unnecessary amount of work before the grade was changed, they would not be entitled to recover for the unnecessary amount of work. But if the defendant's engineer directed the plaintiffs' engineer to go on with the work when they reached the point, and did not tell them that there was to be a change of grade, and the plaintiffs did go on and do the work which became unnecessary when defendant changed the grade and reset the pegs, the plaintiffs would be entitled to recover."

"If in doing the work the plaintiffs *borrowed* any earth which they ought not to have done, or if they wasted any earth which they ought not to have wasted, or if they hauled any dirt which they ought not to have hauled, you will not allow them for such work. That is the whole case. You will in any event find the issues in favor of the plaintiffs, and if upon the evidence you conclude they are only entitled to six hundred and fifty dollars, assess their damages at that sum; but if they did other work for the defendant and defendant agreed to pay them for it, you will say how much,

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and add it to the six hundred and fifty dollars, and say you find the issues in favor of the plaintiffs, and assess their damages at whatever you say is the proper amount, and you may give interest if you think proper."

No exception was taken to the charge as given. The jury found all issues in favor of the plaintiffs, and assessed their damages at eighteen hundred and sixty-six dollars and thirty-one cents, with interest from the 15th day of May, 1882.

Thereupon judgment was rendered in behalf of plaintiffs in presence of defendant's counsel, whose attention was called to the fact that judgment was about to be pronounced, and no objection was made to the charge of the court.

Within ten days after judgment the defendant served notice of appeal to the supreme court, and served case on plaintiffs' counsel, who filed objection, and the case was settled by His Honor.

From the case presented by the defendant's counsel, the exceptions are taken to the charge as given by the judge to the jury—the errors assigned being as follows:

1. "In that he failed to instruct the jury as to the proper construction and application of the written contract of August 11th, 1881, in its bearing upon the issue submitted."

2. "In that he failed to instruct the jury upon the legal propositions legitimately presented and insisted upon by the defendant."

3. "In that, having charged the jury that the quantum of the plaintiffs' recovery depended upon the quantum of negligence on the part of plaintiffs or the defendant, he failed to decide the question of negligence himself, and submitted the question of negligence to the jury."

Mr. J. T. Morehead, for plaintiffs.

No counsel for defendant.

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ASHE, J. Waiving for the present the question whether the defendant's objections were made in apt time, they having neglected, before the case was submitted to the jury under the charge of His Honor, to call his attention to any of the points presented in these exceptions, we are unable to discover any error in the instructions given, which entitles the defendant to a *venire de novo*.

As to the first ground of exception, that His Honor did not instruct the jury as to the bearing of the written contract upon the issue, we are somewhat at a loss to comprehend the import of the exception. If the defendant meant that His Honor should have instructed the jury that as the contract was reduced to writing, parol evidence of any verbal contract between the parties was inadmissible, or that the written contract could not be explained, added to or contradicted by parol evidence, while we concur in the proposition if that is what is meant, we do not agree with the defendant in the former. There was in fact nothing for His Honor to charge on this point. For the written contract was an agreement as to the work and its price on the road after the grade was lowered; but there was a verbal contract made in July, and confirmed by subsequent promises on the part of defendant, for the work done before the grade was lowered, which was not included in the written contract, and for which the defendant promised to pay.

When the agreement of parties is reduced to writing, it is a rule of evidence that parol testimony is not admissible to contradict, add to or explain it. For although there be no law requiring the agreement to be in writing, still the written memorial is the best evidence.

But the rule has no application to this case, for the writing is not a memorial of the *entire* agreement. It was only an execution of one part of the agreement, while the other part was left in parol. The contract made in July had reference to the entire work, but that made and evidenced

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by the writing referred only to the work to be done after the grade was lowered, and was only in part execution of the entire contract. *Doughtry v. Boothe*, 4 Jones, 87; *Manning v. Jones*, Busb., 368; *Twidy v. Saunderson*, 9 Ired., 5. See also *Hawkins v. Lea*, 8 Lea (Tenn.) 42, where it is held, "When it is not intended that a written contract should state the whole agreement between the parties thereto, evidence of an independent verbal agreement is admissible." This disposes of the first exception.

The second exception, "that His Honor failed to instruct the jury upon the legal propositions legitimately presented and insisted upon by the defendant," is quite as difficult to be apprehended as the first. We find no legal proposition any where presented in the record by the defendant, unless their denial that they ever made any other agreement than that set out in the writing of August, and that they were only liable to pay for such work as was necessary to effect the change in the line of the Midland road, are regarded by them as legal propositions. If so, they are already disposed of by what we have had to say upon the first exception.

But conceding that the written agreement had some bearing upon the issue upon which His Honor had omitted to instruct the jury, and the defendant had presented some legal proposition which His Honor had overlooked in giving his charge to the jury, there were no instructions asked of him by the defendant upon these points; and it is well settled that where a judge in his charge to the jury omits to instruct them on a particular point, it does not constitute error, unless he is requested to do so. *State v. O'Neal*, 7 Ired., 251; *Brown v. Morris*, 4 Dev. & Bat., 429; *Hice v. Woodard*, 12 Ired., 293.

If the defendant deemed instructions upon these points material, they should have asked for instructions, and if re-

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fused, the question might have been brought to this court for review. *Arcey v. Stephenson*, 12 Ired., 34.

The principle announced in the above cited cases that an omission of a judge to charge upon a particular point is not error unless asked so to do, is still the law, notwithstanding the enactment of sub-division 3, section 412 of THE CODE, which is as follows: "If there shall be error either in the refusal of the judge to grant a prayer for instructions or in granting a prayer, or in his instructions generally, the same shall be deemed excepted to without the filing of any formal objection."

Prior to this enactment, whenever an exception was taken upon a trial, it was required to be reduced to writing at the time, &c. Section 412, sub-division 2.

The third sub-division of the section was intended to except from the requirement in the second sub-division that the exception must be *taken in writing at the time*, the cases, where the error is assigned in the court's refusal to grant a prayer for instructions, or in granting such a prayer, or in the general instructions given to the jury. But it by no means dispenses with the rule, that instructions must be asked upon points omitted by the court in the charge, and that it is no error to omit these unless asked to charge upon them. The third sub-division only provides that the error assigned in such cases need not be put in writing at the time, but may be taken at any time without writing, even in this court, as was held in *Lawton v. Giles*, 90 N. C., 374.

The third and last ground of error assigned is as untenable as the others. That the court committed an error in leaving in his instructions the question of negligence to the jury, may be one of those errors that might be assigned under sub-division three. And taking it to be so, was it such an error as entitles the defendant to a *venire de novo*?

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The evidence in the case was that the unnecessary work done under the contract with the defendant was caused by their delay in lowering the grade of the road. If His Honor had charged the jury upon the question of negligence, as a question of law, upon the evidence before him, he would have been bound to have told them that the unnecessary work done by the plaintiffs was caused by the negligence of the defendant. But he left that question to the jury, and they have decided it as the court must have instructed them, if it had expressed any opinion upon the point. And where a jury decide correctly a question of law improperly left to them by the court, the verdict cures the error of the court and it is no ground for a new trial. *Glenn v. Railroad*, 63 N. C., 510; *Smith v. Shepard*, 1 Dev., 461.

Our conclusion is there is no error, and the judgment of the superior court of Rockingham is affirmed.

No error.

Affirmed.

W. W. McCANLESS v. H. W. REYNOLDS.

Appeal Bond, justification of, &c

An appeal will be dismissed on motion of the appellee where the undertaking is not filed within ten days after appeal taken, and not justified by one surety that he is worth *double* the amount specified therein. Verbal agreements to waive the statutory requirements will not be regarded.

(*Wade v. Newbern*, 72 N. C., 498; *Lytle v. Lytle*, 90 N. C., 647, cited and approved.)

MOTION of defendant to dismiss the appeal heard at October Term, 1884, of THE SUPREME COURT.

McCANDLESS v. REYNOLDS.

Messrs. Fuller & Snow, and E. C. Smith, for plaintiff.

Messrs. J. M. McCorkle, and Watson & Glenn, for defendant.

MERRIMON, J. The appeal in this case was dismissed at the last term (*McCanless v. Reynolds*, 90 N. C., 648,) upon the ground, that an undertaking upon appeal had not been filed within the time prescribed by law, and the same had not been waived.

The appellant at that term made application by petition for the writ of *certiorari*, alleging that a proper undertaking had been given, and if not filed within the time prescribed by law, it had been filed by the consent of the appellee's counsel, and the clerk had mislaid it, or at all events, failed to attach it to and send it up with the transcript of the record as he ought to have done. Thereupon the appeal was re-instated upon the docket, a diminution of the record was suggested, and the writ of *certiorari* was awarded.

At the present term, the appellant produced and filed the undertaking upon appeal given by him after the time within which he had the right to give the same had elapsed.

The appellee again at the present term moved to dismiss the appeal, because the undertaking upon appeal was not given within the time prescribed by law, and upon the further ground, that the undertaking was signed by but one surety and was not properly justified.

The appellant filed affidavits to the effect that the counsel of the appellee agreed at the time the appeal was taken that the appellant might have time in addition to that allowed by law within which to file the undertaking. The counsel for the appellee state upon affidavit, that they have no recollection of any such agreement, and that they do not believe that any was made. They, in effect, deny that any agreement to extend the time was made.

This court has repeatedly said, that it would not undertake to reconcile conflicting affidavits, or pass upon their

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weight, in respect to verbal agreements to waive the requirements of the statute in respect to appeals. It is not denied that the undertaking in this case was not filed within the ten days after the appeal was taken. No waiver of the time appears in writing out of or in the record, nor was any sum of money deposited with the clerk in lieu of an undertaking by order of the court. So that, upon this ground, the appellee is entitled to have his motion to dismiss the appeal allowed. *Wade v. Newbern*, 72 N. C., 498; *Clarke's Code*, 339.

But, if the undertaking upon appeal filed were treated as having been filed within the time prescribed by law, it is fatally defective, in that it is not properly justified. The surety fails to say in his affidavit of justification that he is worth double the amount specified in the undertaking. *Lytle v. Lytle*, 90 N. C., 647. Motion allowed.

Appeal dismissed.

* ROBERT & T. L. KNIGHT v. E. B. HOUGHTALLING
and others.

Reference—Account—Interest.

The proper method of stating the account in this case is to credit the contract price of the land with the value of all deductions allowed by the court—the difference being the true amount of the indebtedness; and then to compute the interest thereon subject to subsequent credits from payments or otherwise.

CIVIL ACTION tried at Fall Term, 1880, of GRANVILLE Superior Court, before *Eure, J.*

* Mr. Justice MERRIMON having been of counsel did not sit on the of this case.

KNIGHT *v.* HOUGHTALLING.

This was an action to foreclose a mortgage. The facts are fully reported in same case 85 N. C., 17. An account was ordered to be taken by this court, and the case was heard upon exceptions to the commissioner's report.

Mr. M. V. Lanier, for plaintiffs.

Messrs. T. B. Venable, T. C. Fuller and E. C. Smith, for defendants.

SMITH, C. J. Upon the hearing of this cause at October term, 1881, reported in 85 N. C., 17, it was declared that the defendants were "entitled to be allowed every such sum as was reasonably expended by them in procuring the possession of the land and purchasing the crops of every kind agreed to be sold to them, also for the deficiency in the number of acres in the tract at the average price per acre, supposing it to have been sold as containing 750 acres."

To ascertain the amount of these allowances with interest, and the residue due after their deduction from the money contracted to be paid, a reference was ordered, pursuant to which the commissioner proceeded to take evidence, which, with a statement of the account, was reported at the last term, in which a balance of \$2,185.78 is found due the plaintiffs on January 1st, 1884.

The commissioner however at the instance of defendants' counsel prepared and submitted another account, not differing in the items, but in mode of statement and computation of interest, in which the balance ascertained to be due at the same date is reduced to \$1,785.94.

Two exceptions are filed by the defendants to the report:

1. To the principle upon which the account reported is made in the adjustment of the claims which enter into it, it being insisted that the proper method is pursued in the statement of the second account, which the commissioner himself seems to approve, while he felt constrained to make

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the former by the construction he puts upon the ruling in the opinion ; and

2. To the allowance of \$205, the estimated cost of harvesting the wheat in diminution of its value when harvested, for which the defendants have credit.

I. We concur in the views of the defendants' counsel, as presented in the argument in support of the first exception, that the amount contracted to be paid should at once be reduced by the aggregate allowances for the corn and oats and deficiency in the land, as well as by the cash payment of \$2000, inasmuch as all these reductions are in origin co-incident with the indebtedness incurred in the purchase, the residue being the charge to begin with in the computation of interest. The commissioner intimates his approval of this method of stating the account, but considers himself constrained to report the other upon his construction of the ruling upon which the reference was ordered. He then proceeds from this starting point to compute the interest accrued to the time of the next credit, and from the aggregate amount deducts the credit and makes a new interest-bearing residue, and in like manner as to the other subsequent credits, adopting the mode of computation used in cases of partial payments, made upon notes and endorsed thereon.

As the exception does not reach this method of calculation, but on the contrary assumes its correctness, we forbear to express an opinion, as the result of computing interest on the credits would be more favorable to the defendants and they do not demand it.

In our opinion the second account does not vary more than the first from the requirements of the reference, nor does either substantially depart from the directions, which merely allow interest, when in the statement of the account it becomes necessary to do so, as well upon the counter claims as the original. We therefore sustain the exception

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and adopt the second account as showing the true amount due.

II. The second exception must be overruled, for inasmuch as the defendants were entitled only to the wheat standing in the field, its true value in this condition is properly ascertained by finding the market price after harvesting, and deducting therefrom a reasonable charge for the expense of gathering and preparing for market.

It is immaterial whether this labor could have been furnished by the defendants, and if so, its value has been saved to them. It would be unjust to the plaintiffs to allow the full value of wheat ready for sale in the grain, when the defendants could only secure it in this form by an equivalent expenditure of labor which they have saved by the labor of others. This exception is wholly untenable.

The second report must be adopted and judgment may be entered for the sum therein found to be due with interest from January 1st, 1884, and costs, inclusive of the sum of \$..... allowed the commissioner for his services under the reference.

Second account confirmed.

J. J. MOTT v. JOHN A. RAMSAY.

Appeal—Certiorari.

The writ of *certiorari* will be granted, where it appears that the appellant in apt time submitted the case on appeal to the appellee's counsel, who declined to sign it, but suggested that he would prepare another and get the judge to settle the case, and agreed that no advantage would be taken of the delay, but failed to prepare

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a case. The appellee waived the code-time and cannot take advantage of his own negligence. The power of this court over writs of *certiorari* touched upon.

(*Parker v. Railroad*, 84 N. C., 118; *Wiley v. Lineberry*, 89 N. C., 68; *McDaniel v. Pollock*, 87 N. C., 503; *State v. Lee*, 90 N. C., 652, cited and approved.)

MOTION by defendant for *certiorari*, heard at October Term, 1884, of THE SUPREME COURT.

Messrs. J. M. McCorkle and R. F. Armfield, for plaintiff.
Mr. J. W. Hinsdale, for defendant.

MERRIMON, J. The appellee obtained judgment at the spring term, 1883, of the superior court of Rowan county against the appellant, and the latter appealed to this court, and the appeal was brought up to the last October term. But no statement of the case for this court upon appeal appeared in the transcript of the record.

At that term the appellee moved to dismiss the appeal, and his motion was at first allowed, and afterwards, at the same time, for cause shown, the order of dismissal was set aside, and the case was reinstated on the docket. *Mott v. Ramsay*, 90 N. C., 29 and 372.

The appellant then filed sundry affidavits and exhibits, suggested a diminution of the record, and moved that the writ of *certiorari* be granted, commanding the clerk of the superior court to certify to this court the statement of the case upon appeal, when and as soon as the same shall be filed in that court.

It appears that shortly after the appeal was taken, a statement of the case for this court was prepared by the appellant's counsel and submitted to one of the counsel of the appellee; that he declined to approve and sign it, and suggested that it should be submitted to his associate counsel, who knew more of the matter; this was afterwards done, and the latter declined to sign it, but said that he would

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prepare a substitute and let the judge settle the case for this court; he said that he could not at that time prepare his statement thereof. It likewise appears that the appellant's counsel, who usually attended this court, was very ill, and did not attend at the last October term, and of this the appellant had no knowledge until late in the term, and as soon as he learned of the illness and absence of his counsel from the court, he at once employed another counsel.

It also appears that the appellant himself was unusually diligent and active in prosecuting his appeal, and the irregularities and delay attending it have been occasioned by the loose and careless practice that ought not to prevail, and that too often results in detriment to parties litigant.

The counsel for the appellee says in his affidavit that he repeatedly told the appellant that "no advantage would be taken of him in consequence of his said appeal not being perfected in the time required by law, but that if the case was perfected in time to be tried at the supreme court (meaning, plainly, the last October term,) that no advantage for the delay would be taken, * * * and that no statement of the case was sent to the supreme court."

Admitting that the highly respectable counsel for the appellee acted in good faith, it is plain that he agreed that no advantage should be taken of the delay if the case could be tried at the last October term of this court. It appears, however, by the affidavit of the appellant, and this is not denied, that the appellee's counsel refused to approve the statement of the case upon appeal; that he said he would prepare a substitute for it, and then the judge would settle the case upon appeal in the usual way. This he failed to do. So that, it was really the fault, or inadvertence, of the appellee's counsel that the case upon appeal was not settled that so the appellant might have brought it up as part of the record. The failure to file the statement within the time and in the way designated by the statute was ex-

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pressly waived, and the appellee failed on his part to take the next step, that he said through his counsel he would take.

It is clear that where the appeal is not perfected through the negligence, delay or inadvertence of the appellee in respect to something that he ought to do, or where he misleads the appellant by what he agrees to do, or not to do, and this appears to the court, the writ of *certiorari* will be granted, to the end, that the appeal may be perfected and brought up to be heard upon its merits. The appellee will not be allowed to take advantage of his own wrong, negligence or inadvertence, to the prejudice of the opposing party. *Parker v. Railroad*, 84 N. C., 118; *Wiley v. Lineberry*, 89 N. C., 68.

The appeal was taken in apt time. The statement of the case upon appeal was not made, filed and served regularly; but it was submitted to the appellee's counsel, and while he declined to approve it, he said he would prepare a substitute for it and let the judge settle the case. He thus waived the irregularity on the part of the appellant in respect to filing the statement of the case as to time and place. He failed to prepare the substitute as he agreed to do, and ought to have done under the circumstances.

We are therefore of opinion, that the appellant is entitled to have his motion for the writ of *certiorari* allowed, to be directed to the clerk of the superior court, commanding him to certify to this court the case settled upon appeal to the next term, if before that time a case upon appeal shall be settled.

The case for this court may be settled as directed by THE CODE, § 550, with the modification that the appellant may prepare, and serve his statement of the case upon the appellee on or before the 25th day of January next.

The power thus exercised by this court, is incident to its authority to grant and employ the writ of *certiorari* and

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render it effective in perfecting records in it. Without the exercise of such power, great injustice would be done in many cases, and sometimes there might be a failure of justice in matters of the most serious moment. THE CODE, § 3545; *McDaniel v. Pollock*, 87 N. C., 503; *State v. Lee*, 90 N. C., 652.

Let the writ of *certiorari* issue accordingly. It is so ordered.

Certiorari ordered.

HENRY B. OWENS and others v. W. H. PHELPS and others.

Appeal—Certiorari.

Where an appeal is taken, the record should be transmitted to this court and the appeal docketed, whether the case is settled or not, so that all proper action can at once be taken to perfect it for hearing. The *certiorari* is allowed. See *Mott v. Ramsay*, ante, 249.

MOTION of plaintiffs for *certiorari* heard at October Term, 1884, of THE SUPREME COURT.

Messrs. J. M. McCorkle and Hinsdale & Devcreux, for plaintiffs.

Messrs. J. A. Williamson and Clement & Gaither, for defendants.

MERRIMON, J. We are of opinion that the petitioner is entitled to have the case settled upon appeal, for this court, in the action in his petition mentioned, and the writ of

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certiorari, to bring up the whole case as if the same had come up regularly by appeal.

At the term of the court at which judgment was rendered against the petitioner, he took an appeal and gave an undertaking in that respect as required by law. The petitioner's counsel at that term requested the defendant's counsel to extend the time within which to prepare the statement of the case upon appeal. This request was granted, and the time was so repeatedly extended, as appears by the affidavit of the defendant's counsel. The petitioner's counsel being ill, the statement of the case was not made and served within the last extension of time, but it was prepared within a short while next thereafter and sent to the defendant's counsel, and he received it. The defendant, in the meantime, instructed his counsel not to approve of or except to the statement of the case upon appeal, or extend the time further for perfecting the appeal, and the counsel plainly on that account declined to do so.

The appeal was taken to the last fall term of this court. The statement of the case upon appeal was made and served in July next before that term. If the counsel of the defendant had approved of, or excepted to the statement of the case, in the regular course, the appeal might have been tried at the last October term of this court, and without any prejudice to the defendant owing to the extension of time within which to perfect the appeal. The counsel of the defendant simply extended to the counsel of the plaintiff a courtesy for his convenience that did not prejudice his client. The latter cannot take advantage of that to the injury of the petitioner. The time being extended, as is admitted, if the petitioner's counsel became ill and hence unable to make and serve the statement within the exact limit of time agreed upon, but did so shortly thereafter and within time for all practical purposes, this was sufficient, as it ap-

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pears there was from the beginning, a *bona fide* intention to prosecute the appeal.

It would be much better if no such engagements to extend time within which to perfect appeals were ever made. They generally give rise to misapprehension, misunderstanding, and some times unfriendly feelings and bitter contests. But when made and admitted as in this case, the party complaining cannot be prejudiced, more especially where he takes action within time and in manner to work no substantial prejudice to the opposing party.

In this case, it seems to us, that the spirit of the engagement to extend the time, especially in view of the illness of the petitioner's counsel, was substantially complied with, and if the defendant had not interposed his objection, as he ought not to have done under the circumstances, he would not have suffered the consequent delay.

The petitioner ought regularly to have brought up and docketed his appeal, and made his motion therein for the writ of *certiorari*, but as no injury seems to have been caused by his failure to do so, this is not fatal to his present application.

Ordinarily, when an appeal is taken, it ought to be brought up, whether the case for this court is settled or not, and all proper motions to perfect the record for this court can be made in it.

We grant the writ of *certiorari*, to be directed to the clerk of the superior court of Davie county, commanding him to certify to this court the record in the action mentioned in the petition, according to law, including the case settled upon appeal for this court, when the same shall be filed in his office.

The petitioner may make his statement of the case upon appeal, and the case may be settled as directed by THE CODE, § 550, except, that he shall make and serve his state-

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ment thereof on the defendant, on or before the 25th day of January next. *Mott v. Ramsay*, decided at this term, ante 249, and the cases there cited. It is so ordered.

Certiorari allowed.

BENJAMIN A. COX and others v. JOSEPH COX and others.

Will, division of land by—Ejectment, evidence in—Description—Quantity.

1. Where a will designates and assigns to each of the testator's children a share of his land, *it was held* that the same was divided among them, and no other proceeding was necessary for that purpose.
2. In such case, an action in nature of ejectment is a proper remedy to establish a dividing line between two of the devisees, where their claims as to the location of the tracts devised are in conflict.
3. A devise of two hundred acres to A, adjoining the land he now owns, "beginning at the line near B's and running straight across to the back line toward M's, taking the eighty-two acres first, out making out the complement of the balance," is sufficiently certain in its description to admit of parol evidence to locate the tract of two hundred acres—which includes the eighty-two acres.
4. Quantity ordinarily constitutes no part of the description, but when the boundaries are doubtful, it becomes an important element.

(*Reddick v. Leggett*, 3 Mur., 529; *Proctor v. Pool*, 4 Dev., 370; *Stewart v. Salmonds*, 74 N. C., 518, cited and approved.)

EJECTMENT, tried at Spring Term, 1883, of MOORE Superior Court, before *Philips, J.*

Cox v. Cox.

The plaintiffs, who were minors at the time this action was commenced, suing by their next friend, claim the land in controversy under a devise in the will of their grandfather, Thomas Cox, Sr., deceased, to their father, Thomas Cox, Jr., deceased, which devise was in these words:

"I give and devise to my son, Thomas Cox, two hundred acres, adjoining the land he now owns, beginning at the line near A. K. Wicker's, and running straight across to the back line towards Torguill McNeill's, taking the eighty-two acres first and making out the complement of the balance."

The will also contains the following devises: "I give and devise to my son Rufus Cox all the lands on the west side of the road adjoining my sons, Henry A. Cox and Thomas Cox."

"I give and devise to my son Joseph Cox my lands on the east side of the road, where the creek enters into the river, thence up the creek where Wash had a patch, thence up the creek to the next bend at the fish trap, thence up the little creek to the poplar spring, thence up the creek to where Thomas Cox's line comes across, thence to the big road."

"I give and devise to my son Henry A. Cox the tract of land on which he now lives, one hundred acres."

There are other devises of land, but these mentioned are the most important.

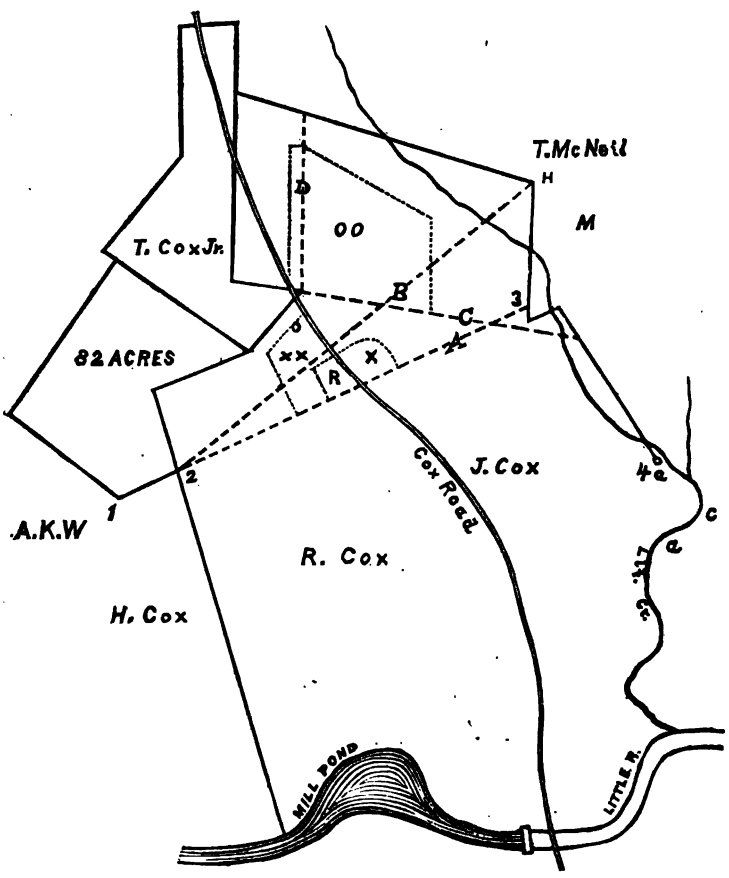
All the parties claimed under the will of Thomas Cox, Sr., who had purchased a large tract of land, including the tracts devised as aforesaid, from William Murchison, by deed bearing date 8th October, 1839, conveying two tracts, one of eleven hundred and forty acres, and another of two hundred acres. This deed was read in evidence by the plaintiffs. They also read in evidence a deed from Archibald G. Douglas to Thomas Cox, the testator, dated 28th of May, 1858, conveying two tracts, one of one hundred acres.

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and the other eighty-two acres ; also a deed from John Godfrey to their father, Thomas Cox, Jr., dated 7th day of August, 1858, conveying fifty acres.

The surveyor (Kelly) who had been appointed by the court to survey the land in controversy for the trial of the cause, reported the plat which is set out in this statement.

PLAT OF SURVEY.



 Cox v. Cox.

The surveyor testified that the eleven hundred and forty acres conveyed by Murchison to Thomas Cox, Sr., covered all the land in the plat except what was called the "eighty-two acre tract," which on measurement was found to contain only sixty-five acres, and the tract of fifty acres, owned by Thomas Cox, Jr. He testified to the location of the eighty-two acre tract and the fifty acre tract of Thomas Cox, Jr., as indicated on the plat.

It was in evidence that A. K. Wicker's land adjoined the eighty-two acre tract on the southwest, the dividing line being represented on the plat by the line running northwest from the figure 1, and near which line is Wicker's house.

It was also in evidence that Torquil McNeill's land adjoined the testator's land on the northeast, the dividing line being represented on the plat by the line "H" to "4 a," and his house by the letter "M."

The Cox road indicated on the plat runs between the shares of Rufus Cox and Joseph Cox—that of Joseph lying to the east, and that of Rufus to the west of the road.

The chief matter in dispute being, what is the dividing line under the will between Thomas Cox, Jr.'s, share and his brothers Rufus and Joseph, the surveyor Kelly, for the information of the court, ran four lines as the dividing lines represented on the plat as "A, B, C and D," with the following results as to the quantity contained in their respective shares under the will:

Line A	gives	Rufus Cox	270	acres.
" "	"	Joseph Cox	165	"
" "	"	Thomas Cox	250	"
" B	"	Rufus Cox	284	"
" "	"	Joseph Cox	201	"
" "	"	Thomas Cox	200	"
" C	"	Rufus Cox	306	"
" "	"	Joseph Cox	174	"
" "	"	Thomas Cox	200	"
" D	"	Thomas Cox	only 100	acres.

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The letter "a" on the creek in the plat represents Wash's patch; "c" the fish trap; the poplar spring is near "4 a," on little creek; "xx" Rufus Cox's field of about seven or eight acres; "X" Joseph Cox's field of about five acres; "O," Rufus Cox's house, and "R" an old field; "00," tenant's house; "A. K. W.," Wicker's land.

There was evidence tending to show that, if "A" was the dividing line, all the defendants were trespassers; the Dalrymples being in possession of a small piece of land which Esther Dalrymple purchased from Joseph Cox lying between the lines "A" and "B." And if "B" was the dividing line, that then, Rufus Cox and George S. Cole, who claimed under Joseph Cox, only were trespassers. But if "C" was the dividing line, George S. Cole only was a trespasser.

Upon the foregoing case made by the plaintiffs, the defendants, without introducing evidence, insisted that the plaintiffs could not recover in this action:

1. Because the devise to Thomas Cox, Jr., is void for uncertainty.

2. Because ejectment is not the remedy.

His Honor intimated that the plaintiffs could not recover in this action for the reason there had been no division of the lands of the testator under the will, and no proceedings ever had to establish the lines between the sons of the testator.

The plaintiff in deference to His Honor's opinion submitted to a non-suit and appealed.

Messrs. R. P. Buxton and M. S. Robins, for plaintiffs.

Messrs McIver & Black and John Manning, for defendants.

ASHE, J. The defendants rested their defence upon two grounds; first, that the devise to Thomas Cox, Jr., was void

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for uncertainty; and secondly, that ejectment was not the proper remedy.

His Honor expressed no opinion upon the first point, but intimated the opinion that the plaintiffs could not recover, for the reason there had been no division of the land of the testator under the will, and no proceedings ever had to establish the lines between the sons of the testator. In this there was error. The lands of the testator were divided by the will itself. They were apportioned out among all the testator's children, and each one's share designated and assigned to him. There could have been no further division among them, for there was no unity of possession between them in any one of the tracts devised. This was evidently one way by which the dividing line between Thomas Cox and his brothers, Rufus and Joseph, could be established, to wit, by an action in nature of ejectment. But His Honor took that question from the jury by the intimation of the opinion which drove the plaintiffs to a nonsuit.

We might stop here and award to the plaintiffs a *venire de novo*, to which they are entitled. But as the case will be again tried, and the other ground of defence, taken by the defendants on the last trial, will probably be again pressed, we deem it advisable to consider that point, as it has been the principal subject of contention in the argument before this court.

There can be no doubt the testator, Thomas Cox, Sr., intended to divide out his lands among all his children, and that his son, Thomas Cox, jr., should have as his share, two hundred acres, to be located on the north of the lands devised to his two brothers, Rufus and Joseph. But they and the other defendants undertake to thwart the will of their father by insisting that their brother Thomas, by reason of the uncertainty in the description of the land devised to him, took under the will of the testator only the eighty-two acre tract. This position cannot be maintained,

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for we are of opinion the description of the land devised to him, though somewhat imperfect and left in doubt, is yet sufficiently certain to admit of parol proof to fix its location and boundary ; or, *in other words, to fit the description to the thing.*

The only difficulty in the case is in the line which begins *at the line near A. K. Wicker's and runs straight across to the back line towards Torquill McNeill's.*

Wherever that line is, the land devised to Thomas Cox lies north of it, for the description is two hundred acres adjoining his (Thomas Cox's) land taking in the eighty-two acres, and the beginning is in the lower line of that tract, between the figures 1 and 2, that being the line near Wicker's and runs straight across toward Torquill McNeill's land.

The call for the beginning *at the line near Wicker's* is answered by beginning at figure 2 on the plat. The call in the devise is, for a beginning at the line near A. K. Wicker's. The line from 1 to 2 is a line near Wicker's land. The will does not say Wicker's house. Then beginning at figure 2, which is the end of the line, the call in the devise is answered, for every corner is at the termination of two lines when they meet, and may be said to be *at each of them.* To begin at any intermediate point in the line from 1 to 2, and run straight across to the back line so as to include two hundred acres would necessarily cut off an angle of the eighty-two acre tract, but the whole of that tract is to be taken in first.

Figure 2 then being established as the beginning, the line that runs thence straight across to the back line towards McNeill's must cross the creek, for the southern portion of the eleven hundred and forty acres devised to Joseph Cox is described as bounded on the east by the creek and running up the creek to where Thomas Cox's line crosses.

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Where the description is constituted of certain localities and specifications, the location of the land must correspond with them.

Here, we have the Cox tract; the eighty-two acres which is to be included; the line from 1 to 2 where the beginning is to be fixed; the line from 2, running across the creek to McNeill's land; and lastly, the quantity—two hundred acres.

Quantity ordinarily constitutes no part of a description, but in doubtful cases it becomes an important element:

In *Reddick v. Legget*, 3 Mur. 529, Judge HENDERSON said, it is in no way material, except in lands where the boundaries are doubtful, and then it may be thrown into the one scale or the other as a circumstance.

In *Proctor v. Pool*, 4 Dev., 370, Chief Justice RUFFIN said, it is true that quantity is not generally descriptive, but it may be so; as if one owns two town lots, one of half an acre and the other of an acre, and grant his acre lot, the larger lot will pass, though a few feet more or less than an acre.

In the case of *Stewart v. Salmonds*, 74 N. C, 518, where the plaintiff's claim was twenty-nine acres of the north side of a tract of land containing one hundred and twenty-nine acres, Chief Justice PEARSON, speaking for the court, said: "Any competent surveyor can do it by running an experimental line on the plat, strike a line east and west, calculate the number of acres north of the line; if over twenty-nine acres, move the line to the north, if less than twenty-nine acres, move the line to the south until you take in exactly twenty-nine acres, then go into the field and with compass and chain and by means of the experimental lines find the east and west line, that will cut off twenty-nine acres and make it." He adds, "this may be a rude way of doing the thing, but the twenty-nine acres may be identified with sufficient certainty for all practical purposes."

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This is what the surveyor has done in this case. Here, as there, the quantity of acres was an important element in the description. Here, as there, experimental lines were run by the surveyor with the view of ascertaining a line from the beginning in the line near Wicker's to the McNeill land that would give two hundred acres of land north of that line. But no such line could be established as the true dividing line unless the land lying north of it, and sought to be located, should answer all the specifications in the description of the devise; *e. g.*, it must give the Cox tract; include the eighty-two acre tract; contain two hundred acres; and the line must begin at the line near Wicker's, and cross the creek to McNeill's land.

The surveyor ran the lines "A" "B" "C" and "D" as designated on the plat. The line "A" gave the plaintiff two hundred and fifty acres, and did not cross the creek. That could not be the true line, because it wanted two elements in the description. Line "C" could not be the line, because it did not begin on the line near Wicker's, and therefore lacked one element of the description. Line "D" is out of the question. Line "B" gives just the two hundred acres with each of the other specifications in the description contained in the devise, and must therefore be the line.

"B" being established as the dividing line between the Thomas Cox portion and those devised to Rufus Cox and Joseph Cox, it is a question for the jury whether the defendants or any of them are in possession of any of the two hundred acres devised to Thomas Cox, Jr., lying north of that line.

There is error. Let this be certified to the superior court of Moore county that a *venire de novo* may be awarded.

Error.

Venire de novo.

WORTHY v. BRADY.

J. A. WORTHY v. JAMES BRADY and others.

Appeal Bond, time of filing—Fictio Juris—Fraud and Fraudulent Conveyances—Voluntary Deed.

1. Upon motion to dismiss an appeal because the bond was not filed within ten days after rendition of judgment, it appeared that the undertaking recited the judgment as having been recovered on the first day of the term, following the fiction that refers all the business of the term to its beginning, but the trial in fact took place during the second week and the date of the justification is within ten days thereafter; *Held*, the motion will not be allowed.
 2. Where a deed to the grantor's son is impeached as a voluntary gift upon the ground that he did not retain property "fully sufficient and available for the satisfaction of his then creditors," as required by Rev. Code, ch. 50, § 3; *Held*, that such conveyance is valid if not made with a fraudulent intent and enough property is retained for all his creditors.
 3. *Held further*: But where such deed provides that the grantee shall support his invalid brothers (naming them) and comply with the conditions imposed, it is not voluntary within the meaning of the above statute, but rests upon a valuable consideration.
 4. *Held also*: The operation of such deed does not depend upon the value of the grantor's reserved estate, but upon the *intent* with which it was made, shared in by the grantee. And upon the question of intent, evidence of his liabilities and value of his undisposed of property is competent to be considered by the jury.
 5. Nor can gifts of visible estate be defeated, where the debtor has resources in stocks or other securities of value to meet his liabilities.
 6. The judge's charge is, in substance, responsive to the instructions, that the retained property must be "sufficient and available" for debts.
- (*Clifton v. Wynne*, 81 N. C., 160; *Black v. Sanders*, 1 Jones, 67; *Pullen v. Hutchins*, 67 N. C., 428; *Warren v. Makely*, 85 N. C., 12; *O'Daniel v. Crawford*, 4 Dev., 197; *Moore v. Hinnant*, 89 N. C., 455; *McCanless v. Flinchum*, *Ib.*, 373, cited, commented on and approved.)

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EJECTMENT, tried at December Special Term, 1883, of MOORE Superior Court, before *MacRae, J.*

The plaintiff appealed from the ruling and judgment of the court below.

Messrs. McIver & Black and J. W. Hinsdale, for plaintiff.

Messrs. W. A. Guthrie and W. E. Murchison, for defendants.

SMITH, C. J. The defendants' motion to dismiss the plaintiff's appeal because his undertaking was not filed within ten days after rendition of judgment, is refused. The undertaking recites the judgment as having been recovered on the 31st day of December, 1883, which was the first day of the term, following the fiction that refers all the business of a term to its beginning, while a judgment does not become complete and final until its close, as is held in *Clifton v. Wynne*, 81 N. C., 160, in construing an act of the general assembly.

The trial in fact occurred, as is shown in affidavits of appellant's counsel, during the second week, and the date of the justification, January 15th, 1884, is within ten days thereafter.

The action was brought against the defendant James Brady for the recovery of the tract of land described in the complaint to which the defendant, Charles Brady, became a party upon his application under a claim of ownership, and that the defendant, James Brady, was his tenant only.

The plaintiff derives his title to the land from a sale under execution against the said James Brady and the sheriff's deed therefor made on January 10th, 1881, to himself, the debts reduced to judgments having been contracted previous to the year 1868. The sale was made on June 7, 1880, of the interest and estate of the judgment debtor in the premises.

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The defendant, Charles, claims title under a deed from the said James, his father, (who enters a disclaimer for himself) bearing date and executed on March 10th, 1868, prior to the judgments, conveying the land in fee.

The recital of the consideration of the conveyance is in these words: "That the said James Brady of the first part, hath two sons, Robert W. Brady and Turner Street Brady, who are partially deaf and dumb. Now if the said Charles Brady shall protect and support the said Robert W. and Turner Street, his brother, as he agrees to do in the same manner as they are now cared for during their natural life, for that consideration of the said Robert W. and Turner Street Brady being taken care of and supported, and the further consideration of one dollar, &c, I hereby convey," &c.

In the *habendum* clause limiting an estate in fee are super-added the words "on his complying with the conditions of these presents."

This deed is impeached, as a voluntary conveyance or gift, because the grantor did not at the time of making it retain property "*fully sufficient and available* for the satisfaction of his then creditors," as required by the statute, Rev. Code, ch. 50, § 3. Much testimony was accordingly offered of the extent of the indebtedness and of the character and the value of the property then remaining to the debtor, with a view of showing the insufficiency of the latter to meet the liabilities of the debtor, under the construction given the statute in *Black v. Sanders*, 1 Jones, 67; *Pullen v. Hutchins*, 67 N. C., 428, and *Warren v. Makely*, 85 N. C., 12.

These cases and the statute have reference to *voluntary gifts or settlements of property* by one indebted at the time, which, in *O'Daniel v. Crawford*, 4 Dev., 197, were declared fraudulent and void against any creditor whose debt was subsisting at the time, however ample were the resources of the debtor, if by reason of subsequent waste or destruction

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of property there was left no means of payment. The statute corrects this ruling and declares voluntary conveyances not made with a fraudulent intent, valid and effectual, if the debtor then had ample property to provide for all his creditors, whatever casualties might befall it thereafter.

The deed set up by the defendants is not in form or fact, *voluntary* or a *gift* within the meaning and purpose of the enabling act.

It is founded upon a valuable consideration in the undertaking assumed by the grantee to protect and support during their respective lives his two partially deaf and dumb brothers, in the manner in which they were then provided for. This contract as truly constitutes a valuable consideration passing between the parties, as would be the payment of money or the giving a note or bond for its payment. The legal operation of the deed does not then depend upon the value of the debtor's reserved estate, but upon the *intent* with which the conveyance is made, and perhaps pre-umptive evidence of the vitiating intent is furnished upon the face of the instrument to be removed by the grantee, and, if not, found as a fact by the jury.

The statute which declares that a mere indebtedness existing at the time of making a gift shall not render the gift void, "when property fully sufficient and available for the satisfaction of creditors" is retained by the donor, declares also that such indebtedness shall, as to present or future creditors, be evidence only from which a fraudulent intent may be inferred, where the fact, with attending circumstances, is submitted to the jury. If the deed be not voluntary, but is supported by a valuable contract, though its execution is to be found in providing for unfortunate or helpless children whose support devolves upon the grantor, its invalidity must be sought in the vitiating intent to withdraw the property from creditors and appropriate it to his own use, and this intent ought to be shared in by the grantee.

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He may have acted in entire good faith in the transaction, and the relation of the parties is but a badge of the fraud to bring it home to the grantee. As is said in reference to an assignment tainted with indications of the fraudulent purpose in its surroundings, in the case of *Moore v. Hinnant*, 89 N. C., 455: "The intent is the essential and poisonous element in the transaction, and not merely the effect, since in every conveyance and appropriation of property, the property conveyed is placed beyond the creditor's reach, and he is so far obstructed in the pursuit of his remedy against the debtor's estate."

Again it is said by this court in a recent case, "Where a father is unable to pay his debts and sells his land or other property to his son for less than its reasonable value, and this appears, the presumption is that the sale is fraudulent as to creditors, but this presumption may be disproved, and whether the sale is fraudulent or not, is a question for the jury." *McCanless v. Flinchum*, 89 N. C., 373.

In this aspect of the case, the enquiries before the jury of the extent of the grantor's liabilities and his undisposed of means of payment, were proper and competent in arriving at the intent, and the plaintiff was not entitled to a charge which would have been appropriate to the case of a voluntary deed.

The charge of the court, however favorably to the plaintiff, declared the deed, because made for the benefit of his children, voluntary in the sense of the statute, not advert- ing to the fact that it was an absolute sale for a valuable consideration in the contract, entered into by the bargainee, the fruits of which undertaking are a gratuity to them, and left the jury to pass upon the value of the reserved estate.

He instructed them that "if there was an existing debt owing by James Brady when he made this deed, he must have retained property *amply sufficient* to satisfy all his debts; if he did retain that much property, he had the right to

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give away his land for the benefit of his children ; if he did not, his deed was fraudulent in law as to his creditors, and as to them, C. Brady would get no title, and the sale by the sheriff and his deed would convey a good title to the purchaser and grantee," the plaintiff.

It is true that in the midst of the charge, the court declined to modify what had been before said to the jury, that the property retained by the debtor "must be amply sufficient to satisfy all his debts," by saying as requested, that the property must be "amply sufficient and available," but such, we think, was the fair import of the language of the instruction given ; for if amply sufficient, it must be also available to the creditors, that is, capable of being subjected to their claims, and such the jury must have understood to be the meaning of it. It would be a senseless proposition that the debtor must have sufficient property to discharge all his debts, and yet that property could not be made available by creditors. The refusal to charge in the very words of counsel, while in substance the instruction is equivalent, constitutes no error of which the plaintiff can complain.

The court was also asked to charge, when the evidence was all in, that unless the confederate debts, that is, as explained in the argument, debts contracted during the civil war and subject to the legislative scale, were collected in 1868, they were not available in the payment of debts, and should not enter into the estimate of the value of the secured property. What is meant by the phrase, "collected in 1868" does not clearly appear, unless it has reference to the delays interposed by enactments of the general assembly in the enforcement of such liabilities, and so understood there was no error committed in refusing so to charge. It is the amount and value of the estate claimed which gives character to the voluntary disposal of the debtor's property, not the facilities afforded or claimed in rendering it promptly available to the creditor, and the real worth of these con-

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federate debts with others, were properly left to the jury with the direction, "You have all the evidence and comments of counsel on the amount of property owned by him. You must say from the testimony whether James Brady retained an amply sufficient amount to pay all his debts."

It is to be observed that the refused instruction is general, not that in law the value of the debtor's remaining property, as shown in evidence in relation to the debts, is not "*fully sufficient*" or ample, for there may be a state of facts when the duty so to instruct rests upon the court. The charge is responsive to the request in the general statement of the law, and the direction to strike out the confederate debts from the list ought not to have been given, but the jury allowed to put their own estimate upon them.

Nor do we concur in the broad proposition that this secured estate must not consist wholly in stocks, bonds or other securities, public or personal, but that the debtor must have such as is directly accessible to final process against him. This would defeat smallest gifts of visible estate while the debtor might have other resources of the greatest value. The statute recognizes no such distinction, and means only that a debtor shall not disable himself from meeting his debts by voluntary alienations of his property. There is no error. Judgment affirmed.

No error.

Affirmed.

SYME v. BADGER.

*ANDREW SYME, Adm'r, and others, v. THOMAS BADGER and others.

Appeal—Judgment.

1. An objection to an undertaking on appeal, based upon the fact that it is not signed by any surety but only by the parties to the record, cannot be sustained where it appears from the record that the judgment appealed from does not affect the party, whose signature gives the security required.
2. Although the word "defendants" is used in the transcript to designate those who take the appeal, yet the record shows that the judgment here is against only one defendant, and in his representative character, and he alone, in law, is the complaining appellant.

CIVIL ACTION tried, upon exceptions to a referee's report, at March Special Term, 1884, of WAKE Superior Court, before *Avery J.*

The suit was brought for an account and settlement of an estate as set out in the opinion of this court. The plaintiffs are Andrew Syme (administrator *de bonis non, cum testamento annexo* of George E. Badger), M. McGehee and wife and Catharine Haigh. The defendants are Thomas Badger (administrator of the deceased executrix of George E. Badger), Paul F. Faison and wife and others—the *femes* plaintiff and defendant being (with defendant Thomas and his brothers) the heirs of said George E. Badger.

The cause coming on to be heard, the court gave judgment in favor of plaintiffs, as set out in the opinion here, "from which judgment the defendants appealed to the supreme court." Notice of appeal was accepted, and the bond fixed at fifty dollars, and the same was executed on the first

*Mr. Justice MERRIMON having been of counsel did not sit on the hearing of this case.

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day of April, 1884, by the defendants, Thomas Badger and Paul F. Faison—the latter stating upon oath that he was worth double the sum specified in the undertaking—pursuant to the form for justification of sureties to appeals.

Upon call of the case in this court, the plaintiffs moved to dismiss the appeal upon the ground “that the undertaking on appeal is not signed by any surety, but only by the parties to the record.”

Messrs. J. W. Hinsdale, Battle & Mordecai and John Devereux, Jr., for plaintiffs.

Messrs. Gatling & Whitaker, for defendants.

SMITH, C. J. The plaintiffs move to dismiss the appeal for non-compliance with the statutory requirement, in that, the accompanying undertaking is without good and sufficient surety, being executed by two of the numerous defendants who are all alleged to be appellants.

While the plural form of the word is found in the transcript in the designation of those who take the appeal and in the appeal-undertaking also, it becomes necessary to look into the record to see from what judgment the appeal comes and the relations of the defendants to it.

The action has for its object to bring to an account and settlement the defendant Thomas Badger, as administrator of Delia Badger, who, as executrix of her deceased husband George E. Badger, took possession of his estate and died without completing her administration, and to recover the assets which were or ought to have been in her hands unadministered at the time of her death. The other defendants were not necessary parties to this action, and the controversy was in respect to the right of the executrix to retain and appropriate the trust funds, which came into her hands, to her own use under the provisions of the testator's will. If this right was not possessed, any excess with which

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she was chargeable was claimed by the legatees who are associated as plaintiffs with the administrator *de bonis non* of the testator.

After a reference, report, exceptions, and rulings upon them, judgment was entered up in the following form:

"It is adjudged that the plaintiffs, M. McGehee and wife and Catharine M. Haigh, recover of the plaintiff Syme the sum of \$571.91, the amount appearing from said supplemental report to be in his hands, less his charges, commissions, and counsel fees; and that they recover of the defendant Thomas Badger, administrator of Delia Badger, \$5,540.97." The residue of the judgment fixes the allowance to the referee and apportions it equally between the plaintiffs and the defendants.

Whatever may be the form of words used in the record, in substance it is manifest that the judgment, intended to be reviewed in this court, is against the defendant Thomas Badger, in his representative capacity and against no one else. It ascertains and determines the value of the unadministered personal estate of the testator in the hands of his (Thomas Badger's) intestate, the deceased executrix. No other defendant has any legal interest with him in lessening the sum so found, and no one else can complain that it is excessive but himself. So no one but this defendant has a right of appeal from the adverse judgment. If he is content, it must stand; if he is dissatisfied, he may have it reviewed, and, if erroneous, corrected in this court. Necessarily then he alone is in law the complaining appellant, and the affirmation of the judgment would not enlarge its scope so as to take in co-defendants. How can persons unaffected by the judgment have any recognized status in asking to have it reversed? The record then requires a legal interpretation that confines the appeal to the defendant Thomas Badger; and the signature of the defendant Faison, gives the security which otherwise the ap-

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pellets would not have. There is no relief demanded, nor any judgment rendered against him, and the action is terminated. He stands in the same relation towards the appeal as would an entire stranger to the record. Upon principle, the objection to the undertaking has no force, nor does it find support in the words of the statute, THE CODE, § 552. It enacts that "a written undertaking must be executed on the part of the *appellant* with good and sufficient surety," that is, the appellant must furnish security to his personal obligation, and that he does in obtaining the execution of one who is not, and cannot, for the reasons stated, be in contemplation of law an appellant.

The undertaking was duly given in four days after rendition of judgment, while the preparation of the case seems to have been prolonged until summer. The motion must be denied.

Motion to dismiss denied.

M. A. MOORE v. D. L. PARKER and others.*Negligence—Damages—Judge's Charge.*

1. Where plaintiff shows damage from defendant's act, which act with the exertion of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence; and proof of care, on the part of the defendant, or of some extraordinary accident which renders care useless, is required to rebut the presumption.
2. In an action for damages, in which the defendant tenant of plaintiff is charged with negligence in burning the plaintiff's house, the fire being communicated by a stove-pipe passing through the weather-boarding; *Held* that the plaintiff's knowledge that

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the pipe was thus placed in the building, does not relieve the defendant from showing proper care in the use of the stove on the particular occasion.

3. The court intimate that running the pipe through the wall without separating it from the wood by some non-combustible substance, is itself an act of negligence.
4. The defendants' instructions in reference to ordinary care were given in substance, though not in the very words of the prayer; and the question of law erroneously submitted to the jury being correctly decided, the verdict cures the error.

(*Aycock v. Railroad*, 89 N. C., 321; *Buie v. Buie*, 2 Ired., 87; *McLennan v. Chisholm*, 66 N. C., 100; *State v. Scott*, 64 N. C., 586; *State v. Hargett*, 65 N. C., 669; *Reynolds v. Magness*, 2 Ired., 26; *Glenn v. Railroad*, 63 N. C., 510; *Ray v. Lipscomb*, 3 Jones, 185; *Hobbs v. Outlaw*, 6 Jones, 174, cited and approved.)

CIVIL ACTION, tried at August Special Term, 1884, of UNION Superior Court, before *MacRae, J.*

In this action the plaintiff seeks to recover compensation in damages for the destruction by fire of two houses belonging to him, and in the occupation of the defendants under a contract of lease, communicated by a stove-pipe passing through the wall and weather-boarding; and negligence is imputed in the manner of putting up the stove and passing the smoke-pipe through inflammable materials, and in the excessive fire made on the occasion.

The defendants allege that the stove and smoke-pipe were thus fixed with the full knowledge and assent of the plaintiff, and that the fire thus communicated was the result of his contributory negligence, and they are not liable therefor.

There was conflicting evidence on the question whether this arrangement for heating the room and placing the stove and pipe in position was with or without the knowledge and concurrence of the plaintiff.

The defendants asked for instructions to the jury, which were neither given in the very words nor refused, as follows:

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1. Negligence is not to be inferred from the fact of injury, but the burden of proof of negligence in this case rests upon the plaintiff.

2. If the jury believe from the evidence that the plaintiff knew when the stove and pipe were placed in his building, and consented that the defendants' clerk (Moyle) should run the pipe through the ceiling and weather-boarding, as stated by defendants' agent, then he contributed to the negligence; his conduct was instrumental in bringing about the loss, and he cannot recover in this action.

3. That the defendants were held only to ordinary diligence and care, such as a man would have taken of his own property, and if the jury believed they exercised such diligence and care, then plaintiff is not entitled to recover.

4. That if the jury believe that if the conduct of the plaintiff contributed to the loss, the plaintiff must repel the presumption.

5. Negligence must be the proximate cause of injury complained of, and proximate cause means a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue.

6. If the defect in the pipe was not obvious, and was not in fact known to defendants, (which in this case is to be presumed) defendants were not bound to use more care than the external appearance of the pipe seemed to demand.

7. If the jury believe that the stove and pipe were put up in the usual manner obtaining in the neighborhood, and the work was faithfully done, the defendants are not liable in this action, though the fire broke out between ceiling and weather-boarding, and destroyed the plaintiff's property.

The judge charged the jury as follows: "There are a good many admissions, and the case is brought down almost to one issue. There is no question about the defendants being the tenants of plaintiff, occupying the house, and that Moyle was their agent occupying the house; and it is also

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admitted that the house was burned. The plaintiff charges that the accident was caused by defendants' negligence or carelessness. The defendants deny this, and they also deny that they occupied but one of the houses on the premises, and say that plaintiff permitted the stove to be put up, saw its condition and made no objection. Upon the facts admitted, the question for the jury is whether defendants or their agent so negligently or carelessly put up and used the stove and pipe as to cause the house to be set on fire and burn." After recapitulating the testimony at this point (not necessary to be set out) the judge proceeded :

"It is the duty of one who rents a house of another to exercise ordinary care in the use of the property, and this means such care as a prudent man uses towards his own property.

If the defendants so cared for this property and the fire was not caused by their carelessness or that of their agent, but was the result of an accident which could not have been reasonably foreseen and guarded against, you will find all issues in favor of defendants. But if they or their agent did not use ordinary care, the care which a prudent man would ordinarily take of his own property, and by reason of such want of care, the house was consumed, they would be liable for the damages which plaintiff sustained by reason of such burning.

The case would extend to the manner in which the stove was erected and the stove-pipe was placed, as well as to the quantity of fire which was kept in the stove.

If the plaintiff permitted the stove to be put up where it was, and the hole to be cut in the ceiling and weatherboarding, and made no objection to the manner in which it was done; or if he saw it, and expressed himself satisfied with it, the defendants would not be held to as strict an accountability as they would if he had objected to it and warned them against it—they would be relieved from the

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imputation of carelessness in putting up the stove-pipe, but still they would be required to take prudent care in the use of the stove to prevent loss by fire.

If he did not consent to its being put up as it was—did they put it up in an ordinarily careful manner to avoid danger by fire: not that they put it up as stoves were usually put up in that neighborhood, but did they put it up as a prudent man would ordinarily have done with his own property, and if they did not, was this the cause of the burning? If it was, they are liable in damages, and you will find all issues in favor of plaintiff, and assess his damages at what you think was a fair value for the house, and if you believe that the smaller house was burned from the same cause, you will also add a fair value of it.

The plaintiff must prove his case, and if in this case the defendants rely upon contributory negligence on the part of the plaintiff, they must satisfy you of such acquiescence or other conduct on the part of the plaintiff as amounted to his giving his consent to its being put up as it was."

To the charge as given, as well as to the refusal of the judge to give the special instructions asked, the defendants excepted. The jury returned a verdict in favor of plaintiff, and from the judgment thereon the defendants appealed.

Messrs. Covington & Adams, for plaintiff.

Messrs. Payne & Vann, Strong & Smedes and J. D. Pemberton, for defendants.

SMITH, C. J. The defendants' first instruction was properly refused in the broad and unqualified terms used, and in its application to the testimony in the present case.

We adhere to the rule laid down in the recent case of *Aycock v. Railroad*, 89 N. C., 321, and enunciated in these words, originally proceeding from the pen of Judge GASTON: "When he (the plaintiff) shows damages from their (the de-

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fendants) act which act, with the exertion of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care or of some extraordinary accident which renders care useless."

It was not contested but that the disposition of the stove and the smoke-pipe was the act of the defendants, and that the house was set on fire where the pipe passed through the wall; and in this condition the stove was used for some time, in heating, without communicating fire to the building; so that the previous care and attention of the defendants had prevented any mischief. It devolved upon them, therefore, to explain, with the means possessed by them of doing so, how on this special occasion the fire was communicated, and to repel the inference of a want of that care and vigilance which had hitherto repressed its outbreak, and prevented damage. This duty obviously, under the circumstances, rested upon those who were using this method of warming the room (and must be supposed to know) to show why what had not happened before did happen on this particular occasion, and thereby remove the imputation of negligence.

Indeed, we are not prepared to say that the court would have erred in telling the jury that running the pipe through the wall without separating it from the wood by means of some non-combustible substance intervening, was itself an act of negligence, because of the hazard it entailed; and certainly, it was not error to decline to give the instruction requested.

2. The second instruction was given, and the jury were told that if the plaintiff permitted the stove to be thus placed, or saw how it was and expressed himself satisfied, *then the defendants would be relieved from the imputation of carelessness in adjusting the pipe in its place*, but they would still be required to take prudent care in the use of the stove.

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The next three instructions, the subject of exception, embracing all but the last, which has been properly abandoned as untenable, were substantially given, and the giving of them cannot be a ground of complaint on the part of the appellants.

A party cannot except for error (in the words of GASTON, J., delivering the opinion in *Buie v. Buie*, 2 Ired., 87), to an instruction which he hath himself prayed.

The same proposition has been reiterated in subsequent adjudications. *McLennan v. Chisholm*, 66 N. C., 100.

So a charge substantially such as asked, though not in very words, is sufficient. *State v. Scott*, 64 N. C., 586; *State v. Hargett*, 65 N. C., 669.

In like manner, when a question of law is erroneously submitted to the jury, and the verdict is such as it would have been if declared by the court in the charge, the error is corrected, and the cause of complaint taken away. *Reynolds v. Magness*, 2 Ired., 26; *Glenn v. Railroad*, 63 N. C., 510; *Terry v. Railroad*, ante 236.

If the error assigned presented the appellant's case in as favorable a light to the jury as if the law had been declared, they cannot, on this ground, have a new trial. *Ray v. Lipscomb*, 3 Jones, 185; *Hobbs v. Outlaw*, 6 Jones, 174.

Applying the facts as presented in the testimony, aside from so much as relates to the alleged contributory negligence of the plaintiff, which is conflicting, it is plain that in laying down the rule to guide the jury in passing upon the question of negligence, instead of telling them whether upon certain facts to be found by them there was or was not negligence, the jury were left free to exculpate the defendants, and in this respect, the charge was more favorable to them than if the law had been positively declared by the court. While it was the duty of the jury to accept the judge's exposition of the law, they were left unembarrassed and at liberty to find it for the defendants.

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The law as declared, is, we think, open to no objection from the defendants, and the jury seemed to have arrived at their conclusion just as if they had received positive instructions upon the point. The court ought to have expounded the law just as the jury have understood and acted upon it, and there surely has no harm come to the defendants in consequence.

There is no error, and the judgment must be affirmed.

No error.

Affirmed.

 JAMES T. COZART and others v. THOMAS B. LYON.

Wills, construction of—Jurisdiction.

A suit for the construction of a devise will not be entertained, where the devisees claim a mere legal estate in the land and no trusts are involved. Cases where the court has given such construction incidentally arising and necessary to the decision of a cause properly before it, reviewed by ASHE, J.

(*Hough v. Martin*, 2 Dev. & Bat. Eq., 379; *Alsbrook v. Reid*, 89 N. C., 151; *Taylor v. Bond*, Busb., 5; *Simmons v. Hendricks*, 8 Ired. Eq., 84, cited and approved.)

CIVIL ACTION tried at Spring Term, 1884, of GRANVILLE Superior Court, before *McKoy, J.*

The defendant appealed from the ruling and judgment of court below.

Messrs. Gray & Stamps and *John W. Hays*, for plaintiffs.

Mr. M. V. Lanier, for defendant.

ASHE, J. The object of this action is to obtain a con-

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struction of the will of John W. Lyon, deceased, in regard to the disposition of his real estate under said will.

A trial by jury was waived, and all the issues of fact as well as of law were submitted to the determination of the court.

On the trial, a plat was exhibited by the parties, showing with general correctness the different tracts of land of the testator, and their relative situation and boundaries in respect to one another.

There were several tracts of land devised by the testator to different persons, lying contiguous to each other, and, in consequence of the want of specification in the description of the land devised in the third item of the will to the plaintiffs, a contention arose between the plaintiffs and the defendant, to whom was devised an adjoining tract; and this action was brought to obtain a construction of the will in this particular, and to have the boundary between the parties defined and settled.

His Honor assumed jurisdiction of the case, construed the will, fixed the boundary in dispute, and ordered the defendant, who was sued as executor as well as devisee, to put plaintiffs in possession of the land embraced within the boundaries as defined in his judgment.

In all this there was error.. The court had no jurisdiction of the case as constituted.

It was an action brought solely for the construction of the will, with reference to the devises therein contained, and it is the equitable jurisdiction of the court which is invoked for that purpose.

The construction of devises of legal interests in land is a legal question, and belongs to the tribunals of law and not to those of equity, and the obscurity of the will furnishes no sufficient reason for applying to equity; and a court of equity will not construe a bill to settle boundaries, except in cases in which the boundaries were once certain and were rendered

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uncertain by the default or fraud of the defendant. *Hough Martin*, 2 Dev. & Bat., 379.

But courts of equity, and now our superior courts in which law and equity are blended, will entertain applications for advice and instructions from executors and other trustees as to the discharge of trusts confided to them, and incident thereto the construction of and legal effect of the instruments by which they are created, but never exercise this jurisdiction when the estate devised is a legal one, and the question of construction is purely legal. *Alsbrook v. Reid*, 89 N. C., 151, and cases there cited to the same effect.

In *Tayloe v. Bond*, Busb. Eq., 5, PEARSON, J., speaking for the court, said: "The idea that courts of equity have a sweeping jurisdiction in reference to the construction of wills is an erroneous one. The jurisdiction in matters of construction is limited to such as are necessary for the present action of the court and upon which it may render a decree or direction in nature of a decree. The court cannot, for instance, entertain a bill for the construction of a devise. Devisees claim by purchase under the devise, as a conveyance. Their rights are purely legal and must be adjudicated by the courts of law. A court of equity can only take jurisdiction when trusts are involved or when devises or legacies are so blended and dependent on each other, as to make it necessary to construe the whole in order to ascertain the legacies."

In *Bowes v. Smith*, 10 Paige, 693, it was said by the court that the heirs at law or devisees who claim a mere legal estate in real property, when there was no trust, have never been allowed to come into a court of equity for the mere purpose of obtaining judicial construction of the provisions of the will.

In *Bailey v. Biggs*, 56 N. Y., 407, it is held that "the jurisdiction (in construing wills) is incidental to that over trusts. There is nothing of that sort here. The title and possession

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of the plaintiff is purely a legal one. The title of the defendants, if they have any, is of the same kind."

The principle announced by these authorities is with reference to the advisory jurisdiction of the courts of equity. But there are cases where the courts of equity will put a construction upon wills and deeds where questions of that kind incidentally arise in actions or proceedings pending in them, under some of the heads of their acknowledged jurisdiction. It was so held in the case of *Simmons v. Hendricks*, 8 Ired. Eq., 84, in which the court say: "A court of equity will not take jurisdiction simply to put a construction on a deed or devise, because that is a pure legal question. There is a plain remedy at law, and such an assumption on the part of a court of equity would break down all distinction between the two jurisdictions. But where a case is properly in a court of equity, under some of its known and accustomed heads of jurisdiction, and a question of construction incidentally arises, the court will determine it, it being necessary to do so in order to decide the cause." That was a bill in equity filed for partition, of which the court had concurrent jurisdiction with the courts of law, and a construction was there given to a devise which was necessary to decide the cause. But in our case the action is not instituted under any known head of equity jurisdiction, but is brought solely for the purpose of obtaining the construction of the court upon a devise contained in the will.

The action cannot be sustained, and must be dismissed for want of jurisdiction.

Action dismissed.

AUSTIN v. KING.

J. E. AUSTIN and wife v. H. B. KING.

Deed, effect of registration, and surrender of unregistered—Evidence—Declaration of party in ejectment.

1. An unregistered deed for land passes an inchoate legal as well as the equitable title, and the registration completes the title.
2. As an unregistered deed does not pass the complete legal title, it may be surrendered or destroyed, and the grantor thereby re-invested with the title, provided the same be done by agreement of the parties and in good faith, and not to the prejudice of third persons.
3. In ejectment, upon trial of an issue as to whether an unregistered deed was surrendered to the party under whom the plaintiff claimed, the defendant, for the purpose of showing it had not been surrendered, offered in evidence a will under which he claimed and in which the testator recognized the land as his own. The plaintiff objected, upon the ground that the evidence thus furnished was a declaration of the testator and in his own interest, and the court sustained the objection, but admitted the evidence "as a circumstance" to be considered by the jury; *Held* error—whether it be treated as a "declaration" or a "circumstance," the effect is practically the same. *Held further*, that the will is incompetent evidence upon the issue.
4. While improper evidence ought not to be allowed, yet, when it is, the opposing party may be permitted to rebut it by like evidence, and if it be seen that no injustice results therefrom, a new trial will not be granted.

(*Morris v. Ford*, 2 Dev. Eq., 412; *Walker v. Coltraine*, 6 Ired. Eq., 79; *Phifer v. Barnhart*, 88 N. C., 333; *Hare v. Jernigan*, 76 N. C., 471; *Davis v. Inscoe*, 84 N. C., 396; *Love v. Belk*, 1 Ired. Eq., 163; *Beaman v. Simmons*, 76 N. C., 43; *Cheek v. Watson*, 90 N. C., 302; cited and approved).

EJECTMENT tried at August Special Term, 1884, of UNION Superior Court, before *MacRae, J.*

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John Morgan Rea, on the 25th day of March, 1857, by proper deed, conveyed the land in dispute to his son, John L. Rea, who was the father of the *feme* plaintiff. John L. Rea died in December, 1862, leaving surviving him the *feme* plaintiff, his only heir at law. At that time she was an infant of tender years.

The son, John L., on the 18th day of October, 1858, on account of some entanglements, executed and delivered to his father a deed, reconveying the land to him, but this deed was never registered.

It is alleged, that afterwards, about Christmas of the year 1858, the father redelivered, or surrendered the last mentioned deed to his son, John L., to be cancelled, and to the end, the title to the land might remain in the latter, and whether it was so surrendered or not, is the principal question raised by the pleadings and evidence.

John Morgan Rea, the father, on the 26th day of March, 1859, published his last will and testament, and afterwards died in that year, and his will was duly proved. By this will, he devised the land in question and other land to his wife for life, remainder to his two sons, James and Pinkney. James afterwards conveyed his interest therein to his brother Pinkney and Elizabeth Howard, on the 31st day of October, 1866, and Pinkney conveyed his interest thus acquired to the defendant on the 19th of October, 1868, and Elizabeth Howard and her husband James, conveyed her interest to defendant on the 18th day of December, 1869.

On the trial, to defeat the *prima facie* title, the defendant put in evidence, the said deed, dated the 18th day of October, 1858, executed by John L. Rea to his father, purporting to *reconvey* to him the land in question. This deed was not registered when put in evidence, but by agreement in presence of the court, no objection was made on that account.

The plaintiffs admitted the execution of this deed, but contended that it had been surrendered to John L. Rea, as

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stated above, and had no operative effect, and that the defendant, or those under whom he claims, came into possession of it improperly, and in a way not explained by the evidence.

On the one hand, the plaintiffs introduced evidence tending to support and prove this contention; and on the other hand, the defendant introduced evidence tending to controvert and disprove it.

The defendant put in evidence the will of John Morgan Rea, for the purpose of showing that he had devised the land in question to his two sons, James and Pinkney, thus indicating that he recognized the land as his own, and as tending to show that he had not surrendered or redelivered the deed to his son, John L. Rea. The plaintiff objected to the admission of the will, *as a declaration* on the part of the testator, because it was in his own interest, and insisted that "it was not proper for the jury to consider the said will, or anything in it, in passing upon the question as to whether or not the deed from J. L. to J. Morgan Rea, was surrendered." The court sustained the exception to the extent of saying to the jury that "it is not competent as a declaration, but is a circumstance which you may consider in reaching your conclusion whether or not the said deed was surrendered." The plaintiffs excepted.

As tending to avoid the inference to the prejudice of the plaintiffs that might be drawn by the jury from the devise in the will referred to, they proposed to show by witnesses that at the time the testator executed the will he had become suddenly sick, was violently ill, and died shortly afterwards; that he was not insane, but in a high state of excitement; and for the like purpose, they offered to show that the testator had, by his will, undertaken to devise a tract of land of fifty-four acres that did not belong to him, but to his wife, and that he never claimed it as his. The defendant objected to the reception of such testimony, the

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court sustained the objection and the plaintiffs excepted and appealed from the judgment rendered.

Messrs. Covington & Adams, for plaintiffs.

Messrs. Payne & Vann, for defendant.

MERRIMON, J. In this state an unregistered deed for land passes an inchoate legal, as well as the equitable title, to become complete and absolutely operative for all proper purposes according to its true intent, as soon as it shall be registered. Registration is in lieu of livery of seizin, attornment or other ceremonies necessary to make certain classes of conveyances operative at the common law. It makes the deed "good and available in law," as well as equity, from the time it was delivered. The unregistered deed is *in fieri* until it shall be registered, when at once its legal availability supervenes, relating back to the time of its delivery. THE CODE, § 1245; *Morris v. Ford*, 2 Dev. Eq., 412; *Walker v. Coltraine*, 6 Ired. Eq., 79; *Phifer v. Barnhart*, 88 N. C., 333.

This view does not contravene what is held in respect to unregistered deeds in *Hare v. Jernigan*, 76 N. C., 471, and the cases there cited, and the later case of *Davis v. Inscoc*, 84 N. C., 396. These cases simply decide, that such deeds are not "good and available in law" to pass the complete legal title, and that only the equitable estate passed by them can be dealt with effectively.

As the unregistered deed does not pass the complete legal estate, it is competent for the alienee, bargainee, or donee, to surrender such deed to him who executed it, and thus reinvest him with the title as he had it just before the deed was executed. And so it would be, if such deed were cancelled or destroyed by agreement of the parties thereto. As the contract to convey the land, as embodied in the deed, had not been completed by the forms and requisites re-

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quired by law to make it absolutely operative, such contract might be rescinded or abandoned like any other contract not required to be consummated in a particular way prescribed by law. *Love v. Belk*, 1 Ired. Eq., 163; *Beaman v. Simmons*, 76 N. C., 43; *Davis v. Inscoc, supra*.

But such surrender, cancellation or destruction of an unregistered deed can be made only by agreement of the parties to it, or those claiming under them, and it cannot be made fraudulently, and to the prejudice of third parties. *Morris v. Ford, supra*.

So that the bargainee in the deed in question, it being unregistered, might have surrendered it to the bargainor, and if he did so in good faith, the title to the land embraced by it, remained in the latter in the same plight and condition as he had it just before the deed was executed, and as if it had never been executed.

The evidence introduced by the plaintiffs tending to show that this deed was surrendered was very strong if the jury believed it. The evidence produced on the part of the defendant controverting such surrender does not appear in the record, but it may have been, probably was, equally strong, and a slight fact may have turned the scale on the trial in favor of the defendant, so that it became important to exclude slight improper evidence on the one side or the other.

The court probably instructed the jury that the will of John Morgan Rea could not be received and considered by them as a *declaration* on his part, to the effect that he had surrendered the deed to his son, because such a declaration, in any view of it, was in his own interest and therefore incompetent. We think, however, that the court erred in telling the jury that they might consider the will as a *circumstance*, in reaching a conclusion as to whether or not the deed was surrendered. It is difficult to see how the will could not be treated as a declaration on the part of the tes-

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tator, and yet it could be competent as a circumstance making evidence for the purpose mentioned! Whether it be treated as a declaration, or a circumstance, the effect is practically the same. The mere fact that the testator made a will was wholly irrelevant, and had no bearing on the question before the jury. The court probably meant to say, that the jury might consider the fact, that the testator undertook to dispose of the land by it, as a *circumstance*, but anything he said in the will in terms or effect declaring that the land was his, or any disposition of it assuming it to be his, was in effect a declaration on his part that it was his, and the inference to be drawn by the jury is the same whether the devise of the land be treated as a declaration or a circumstance.

All such declarations, whether made in or out of the will were incompetent, because they were made in the interest of the party making them. The law does not allow a party thus to make evidence for himself and those who claim to take benefit of such declarations under him.

In another aspect, the will, or rather what it contained in respect to the land embraced by the deed, was incompetent as evidence. If the bargainor or bargainee were both alive and an action were pending between them involving the question as to the surrender of the deed, the bargainee would be competent as a witness in his own behalf. Any declaration of his made orally or in writing to the effect that the land was his, would be hearsay and therefore incompetent. It would be a declaration in his own interest, and as well, a declaration made in the absence of the bargainor, not under oath with opportunity to the adverse party to cross-examine the witness.

The evidence objected to was incompetent, as was also the evidence offered by the plaintiffs to show that the testator had by this will undertaken to devise other land not his own, and the state of his mind and body at the time he ex-

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ecuted his will ; but if this evidence had been admitted it might have impaired the weight of the evidence thus improperly received, to such extent as to render it so slight as not to be a sufficient ground for a new trial ; in such case, the parties would have been upon something like an equal footing. As the court admitted the improper evidence on the part of the defendant, and refused to admit like improper evidence bearing directly on it, to rebut or counteract it, the probability is it had considerable weight, and may have turned the scale in favor of the defendant.

Improper evidence should not be admitted, but when this is done, if the opposing party proposes to rebut it by evidence bearing directly upon it and is allowed to do so, and no actual injustice seems to have resulted from such improper evidence, this would not be ground for a new trial. *Cheek v. Watson*, 90 N. C., 302.

In this case, especially as like evidence offered on the part of the plaintiff to rebut it was rejected, we can see that the improper evidence received might have had, indeed probably did have, very considerable weight with the jury. It was well calculated to mislead them. We, therefore, think the plaintiff is entitled to a new trial and so decide. To that end, let this opinion be certified according to law.

Error.

Venire de novo.

 BAITY v. CRANFILL.

GEORGE W. BAITY, Adm'r, v. ELKANA CRANFILL.

Marriage—Legislative Power.

1 Marriages between persons nearer of kin than first cousins (here an uncle and niece) followed by cohabitation and birth of issue shall not be declared void in any proceeding after the death of either of the parties thereto. The power of the court to declare such marriages void, is confined to cases where the parties are living; for a decree of nullity affects their personal status or condition.

2. It is competent for the legislature to impose, and therefore to remove conditions in respect of the marriage relation, the subject being one of legislative regulation. Acts of assembly reviewed by SMITH, C. J., and their retrospective operation discussed and upheld.

(*Cooke v. Cooke*, Phil., 583; *State v. Harris*, 63 N. C., 1; *State v. Adams*, 65 N. C., 537; *State v. Whitford*, 86 N. C., 636; *Long v. Barnes*, 87 N. C., 329; *Crumph v. Morgan*, 3 Ired. Eq., 91, cited and approved.)

SPECIAL PROCEEDING, commenced before the clerk and heard at Spring Term, 1884, of DAVIE Superior Court, before *Gilmer, J.*

This proceeding was instituted by the plaintiff as administrator of Levi Cranfill, deceased, against the defendant as heir-at-law, to obtain an order to sell land for assets.

The facts appear in the opinion. The plaintiff appealed from the judgment of the court below.

Messrs. Watson & Glenn and *J. A. Williamson*, for plaintiff.
Messrs. J. M. McCorkle and *E. L. Gaither*, for defendant.

SMITH, C. J. The defendant is a son by a former wife of the plaintiff's intestate, who after her death intermarried with Mahala Triett, his niece, on the 26th day of November, 1869, and lived with her in the relation of husband and

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wife until his own death, in the year 1873. The issue of their marriage were two children, of whom one died before and the other (bearing his father's name) after the institution of the present suit.

After the grant of letters of administration to the plaintiff upon the intestate's estate, the said Mahala, as his surviving widow made application and had assigned to her in due course of law her year's allowance, almost entirely in specific articles, with a small sum to be paid in money for the deficiency which passed into her possession and absorbs the personal estate. She also instituted her action against the defendant Elkana and the son Levi, the heirs-at-law of the deceased husband, under and pursuant to which her dower was allotted and assigned in his descended lands. The defendants made no resistance to the claim of dower or the assignment when made, and informed the probate judge when he made the appointment of administrator that the said Mahala was the widow of the intestate and her child one of his next of kin.

The present action, now depending against the said Elkana alone as heir-at-law of the intestate, is to obtain an order of sale of the descended lands for the payment of debts of the decedent, and is opposed upon the ground that the marriage with said Mahala, because of their near relationship, was and remained void, and the delivery of the articles to her for her year's support under the assignment of the commissioners was a *devastavit*, for the value of which the plaintiff is personally responsible, and must account for and apply to the indebtedness before the lands can be sold for that purpose.

Two propositions are involved in the defence, and are necessary to its success, and these are :

1. The absolute and continued nullity of the marriage, and

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2. The liability of the administrator for the loss of the personal estate adjudged to the widow.

The law in force at the time when the marriage was solemnized is found in the Revised Code, ch. 68, § 9, and is in these words:

"All marriages contracted after the twenty-seventh day of December, eighteen hundred and fifty-two, and all marriages in future between persons nearer of kin than first cousins, shall be void."

These and marriages contracted between a white person and a free person of color to the third generation, are the only marriages prohibited and made void by express statutory provisions, other causes of nullity being left to operate as at common law.

The legislation contained in this chapter is superseded by the enactment of February 12th, 1872, to be found in Bat. Rev., ch. 69, the second section of which defines the impediments in the way of a lawful and valid marriage, among them being a marriage "between any two persons nearer of kin than first cousins," and declares such to be void, subject to a proviso subjoined as follows:

Provided that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or Indian, or of negro or Indian descent to the third generation inclusive, and for bigamy.

Section 2 of chapter 37 of Bat. Rev., confers upon the superior courts jurisdiction in term time of marriages contracted contrary to the prohibition in section two of chapter 69, or therein declared void, to declare and adjudge "such marriage void from the beginning subject nevertheless to the provision contained in said section," and already recited.

The succeeding section declares that the marriages interdicted between a white person and one of negro or Indian

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blood within the degree specified, "shall be absolutely void to all intents and purposes and shall be so held and declared by every court at all times whether during the lives or after the death of the parties thereto." Bat. Rev., ch. 37, §§ 2 and 3.

Again, the general assembly further amended the law by extending the inhibition arising from kinship to those of half blood, but with a proviso that this shall not invalidate a marriage theretofore contracted, and that the computation as to existing marriages shall be by counting relations of the half blood, as being only half so near kin as those of the same degree of the whole blood. Acts 1879, ch. 78.

These statutory provisions are referred to, as indicating, as in our opinion they clearly do, an intention to confine the power conferred upon the court to declare void, or in a judicial proceeding to treat as void, except where the intermarriage is between the specified races or involves the offence of bigamy, to cases, whenever the power is exercised, during the lifetime of the parties, or after death, only when there has been no issue born to them. The structure and interdependence of these several sections are in harmony only when such an interpretation is put upon the proviso first quoted.

It speaks prospectively as to the exercise of the judicial authority bestowed, but it is an authority to be exercised upon all subsisting marriages before specified, when the relation may have been entered into, as well as such as may thereafter be formed. The words are "that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except," &c., thus imposing restraints after death, not attaching during life.

If this is not the intent, why was it necessary in the act of 1879 placing kinship of the half-blood upon the same footing as kinship of the full blood, that the authority to declare void the marriages between persons so related *here-*

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before contracted should not be exercised, unless in other cases of previous marriage it might be exercised? It is indeed in the nature of a statute of limitation upon the delegated or recognized judicial power, confining its exercise with a single exception to the lifetime of the parties, and, if cohabitation and offspring followed, withholding it afterwards, so as not to operate as a posthumous bastardizing of children born to them. It is but saying to the parties, thus living together and assuming the marital relation, that it shall not be disturbed after death to the injury of innocent offspring. This is in our opinion the manifest purpose expressed in the legislation.

2. Is this legislation, so interpreted and understood, effectual in its operation upon pre-existing marriage contracts, or is it ultra-constitutional?

The competency of the general assembly to impose, implies the right to remove the restraints and conditions incident to the formation of the marriage relation and the contract which creates it. There are no vested rights in the present case to be affected by the legislation. Its force is spent in fixing the personal status of parties at the death of one of them, and placing it beyond the disturbing power of the court. Its declaration to the living is that the actual status then subsisting, where a child is born, shall be and remain a legal status when death comes and dissolves the relation for the future. The parties come under the operation of this law and choose to acquiesce in the announced result, when the relation remains unbroken in life.

We see no substantial reason for denying to the legislature the right to remove impediments, that itself created, to a valid and effectual marriage, and which, but for a positive act, would not exist. In *Moore v. Whitaker*, 2 Harr. 50, where a similar disability from near relationship was imposed by the general law and was removed by a special enactment applicable to a single case, the court uses this forcible language in answer to a similar objection:

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"The disability was a statutory one. The legislature has the power to declare what shall be valid marriages. They can annul marriages already existing, *a fortiori*, they can render valid, marriages which, when they took place, were against law. * * * The whole subject is one of legislative regulation, and the act to confirm this marriage, though contracted within the prohibited degree, disposed of all legal objection to its validity."

The power to annul marriages is in this state withdrawn from the general assembly and committed exclusively to the courts, but in the absence of such constitutional provision, the reasoning is equally applicable to the law of this state.

A similar decision was rendered in the supreme court of Maryland, and an act validating a marriage between uncle and niece declared constitutional. *Harrison v. State*, 22 Md., 468. And so we have sustained legislation which retrospectively gave sanction and validity to the marriage of slaves at a period when they were incapable of entering into such contract. Acts 1866, chap. 40, § 5.

This legalizing effect was given to the relation where the cohabitation continued after emancipation from its origin, and directions are given to make this a matter of record. THE CODE, § 1842.

The validity of the statute in creating retrospectively a legal marriage relation between slaves is upheld in *Cooke v. Cooke*, Phil., 583; *State v. Harris*, 63 N. C., 1; *State v. Adams*, 65 N. C., 537; *State v. Whitford*, 86 N. C., 636; *Long v. Barnes*, 87 N. C., 329.

In *Cooke v. Cooke*, *supra*, the extent of and the limits to the exercise of such legislative power are thus stated by the late Chief Justice:

"If the marriage be a nullity for the want of the essence of the matter, that is, the consent of one of the parties, as in the case of *Crump v. Morgan*, 3 Ired. Eq., 91, where one

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of the parties being lunatic the court decreed a divorce of nullity of marriage, neither a convention nor legislature, nor any other authority has power to make the marriage valid; but if the marriage be invalid by reason of the non-observance of some solemnity which is required by statute, as the presence of a minister of the gospel, or a justice of the peace, that want of form may be supplied by an ordinance of the convention."

In the latter category may be placed the obstacle of near relationship interposed by the statute.

So in *State v. Adams*, BOYDEN, J., declares the effect of the act to be to all intents and purposes to render the parties, thus cohabiting, man and wife, and to devolve upon each the duties and responsibilities of the married state."

The legislation in reference to the marital relations formed between slaves by their consent to live together as man and wife, is not in this feature distinguishable from that now under consideration. A mere contract between persons of different sexes, followed by cohabitation, does not constitute marriage in a legal sense between slaves as it does not between free persons.

"A slave being property," says PEARSON, C. J., "has not the legal capacity to make a contract, and is not entitled to the rights or subjected to the liabilities incident thereto. He is amenable to the criminal law, and his person (to a certain extent) and his life are protected. * * * Marriage is based upon contract, consequently the relation of man and wife cannot exist among slaves."

Hence the efficacy of the enactment was to convert an illicit into a legal relation with the consent of the freedman, and on the conditions specified in the act, whereby the status of husband and wife was acquired with such incidents, aside from criminal liability, as would attach to a marriage valid from the incipiency of cohabitation.

The act of 1879 does not, however, go so far. It does not

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render the connection legitimate from the beginning, making valid that which was before void. It simply limits the time in which legal proceedings may be instituted to annul the marriage, or in which its nullity may be adjudged collaterally in a pending case, and this action must take place during the lives of both, or, where issue is born, it cannot take place at all. Death under such circumstances gives legal sanction to that which had been forbidden, and places the validity of the marriage contract beyond further question, except for the causes upon which the statute does not operate. What reasonable objection can be made to a law thus operating upon a marriage relation formed *de facto*, and not authorized because of a mere disabling statutory interdict, where the parties themselves have assented to and recognized the relation?

The proviso is broad and comprehensive in its declaration that under such circumstances after death, "no marriage followed by cohabitation, and the birth of issue (subject to the exceptions) shall be declared void," that is, adjudged void in any legal proceeding.

There could be no direct proceeding for a sentence of nullity except during life, for such sentence affects the personal status or condition of parties, and no one can represent either when dead. The meaning is that such marriage must then stand with all its legal consequences, and its validity no longer open to controversy, and such legislation is in our opinion free from complaint as to its validity.

This view disposes of the appeal and renders it unnecessary to pass upon other matters presented in the argument. There is error in the ruling of the court upon the exception and in dismissing the action. This will be certified for further proceedings in the court below according to law as declared in this opinion.

Error.

Reversed.

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PATTIE ARRINGTON v. W. H. ARRINGTON and others.

Appeal—Practice.

This court will not entertain appeals from detached rulings upon some of the matters in dispute; but all matters necessary to a disposition of the case should be passed on and settled in a single trial, and the whole case brought up on appeal. The method of disposing of this controversy pointed out by SMITH, C. J.

(*Hines v. Hines*, 84 N. C., 122; *Com'rs v. Satchwell*, 88 N. C., 1; *Jones v. Call*, 89 N. C., 188; *Grant v. Reese*, 90 N. C., 3, cited and approved.)

•CIVIL ACTION tried at Fall Term, 1883, of VANCE Superior Court, before *MacRae, J.*

This action was commenced in Nash superior court, and upon affidavit removed to Vance for trial. The suit was brought upon a judgment, recovered in Franklin superior court, in favor of the defendant W. H. Arrington and the plaintiff (who were married on the 14th of January, 1868), against the sureties upon the bond of L. N. B. Battle as guardian of plaintiff, and against the sureties upon the administration bond of said Battle as administrator of John Evans, a deceased surety upon said guardian bond.

The defendants appealed from the judgment of the court below. The matters relating to the point decided by this court are sufficiently stated in its opinion.

Mr. Joseph J. Davis, for plaintiff.

Messrs. Fuller & Snow and *E. C. Smith*, for defendants.

SMITH, C. J. This action is prosecuted by the plaintiff Pattie D. B. Arrington to enforce payment of a judgment recovered in the name of William H. Arrington, then her husband, and herself in the superior court of Franklin upon

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an indebtedness due to her prior to their marriage in the year 1868, subject to several part payments, upon an allegation that the marriage relation between them has been dissolved by a decree rendered by a court possessing jurisdiction in the state of Illinois, in her behalf, restoring her status as a *feme sole*.

Subsequently, the said William H. Arrington and the members of the partnership firm of W. H. Morris & Sons, to whom he had assigned the judgment, were made parties defendant in the action, and they as well as the debtors, the original defendants, put in answers and set up different defences; the said Arrington and his assignees controverting the validity and effect of the divorce proceeding and the alleged decree, and claiming the right under the law in force at the date of the marriage of the former, transferred to the assignees, to reduce the debt into possession and appropriate the proceeds to their use.

The only issue made up and passed on by the jury was as to the legal efficacy of the decree of divorce in dissolving the bonds of matrimony formed in this state, and in reinstating the *feme* plaintiff in the possession of her antecedent right to the fund in dispute as a *feme sole* freed from her coverture. This issue, determined in her favor, was followed by a judgment declaring "that the said Pattie D. B. Arrington is divorced from the said William H. Arrington, and was so divorced on the 16th day of November, 1880," and further, that "this action is retained for further hearing." From this judgment the defendants W. H. Arrington and W. H. Morris & Sons appealed.

At the same time a reference was ordered to ascertain the facts concerning several matters of defence, set up by other defendants to the action, and which are brought in controversy between the claimants of the fund and those charged with the indebtedness, the report of which was to be returned to the ensuing term.

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The primary inquiry is as to the amount due and owing on the judgment, and the apportionment among the debtors of their several liabilities, *inter sese*, for its satisfaction. The right to the money, when collected and paid in, is secondary and posterior in order of time. The question as to who is entitled to receive, would never arise, should it turn out after examination that nothing is due to any one. Obviously, therefore, in the orderly course of procedure the trial of the issue before the jury was premature, and the appeal raises a point which may become wholly immaterial, while the essential matter of the indebtedness remains to be disposed of in the superior court, before the finding of the jury can have any practical bearing or application.

We have repeatedly refused to entertain appeals from a ruling upon one of several matters controverted in the pleadings, and essential elements in the constitution of a cause of action, the determining of all which is necessary to a final judgment; or, in other words, we have declined to entertain fragmentary appeals, and have required all the matters necessary to a complete disposition of the cause to be settled in a single trial.

To allow separate and successive appeals from detached rulings upon some of the matters in dispute, while others are left open to be disposed of afterwards, is not only repugnant to the simplicity and directness of our present system of practice, but might result in hurtful delays and increased expense in demanding several trials when one should subserve every useful purpose.

The rule is laid down in *Hines v. Hines*, 84 N. C., 122, wherein Mr. Justice ASHE, delivering the opinion, thus speaks: "The parties in this case should have gone on regularly to trial of the case *upon all the issues raised by the pleadings*, according to the regular practice of the court; and if the court should have erred in its judgment or any of its rulings, *then to have brought up the whole case by appeal, that*

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its decision upon questions of law, involved and controverted, might be finally adjudicated."

The same ruling is made and appeals dismissed in *Commissions v. Salchwell*, 88 N. C., 1, and in *Jones v. Call*, 87 N. C., 188; and the principle approved in *Grant v. Reese*, 90 N. C., 3.

A different practice would promote no useful end, and might be attended with great inconvenience, if allowed.

The appeal must be dismissed, and the cause be left to proceed in the court below as if none had been attempted. Let this be certified.

Appeal dismissed.

F. M. GAITHER and others v. CASPER SAIN, Adm'r, and others.

Statute of Limitations—Judgment Quando—Cause of Action.

1. The statute which bars actions upon judgments after the lapse of ten years from the date thereof, does not apply to actions commenced before August, 1868, or where the right of action accrued before that date.
 2. A judgment *quando* (unlike a final judgment) founded upon a right of action that accrued before said date, is not a new cause of action, and hence under section 136 of THE CODE, a suit upon it is governed by the statute of limitations and the law in force prior thereto.
- (*Rountree v. Sawyer*, 4 Dev., 44; *Henderson v. Burton*, 3 Ired. Eq., 259; *Lash v. Hauser*, 2 Ired. Eq., 489; *Dancy v. Pope*, 68 N. C., 147; *Ray v. Patton*, 86 N. C., 386; *Rogers v. Grant*, 88 N. C., 440, cited and approved.)

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CIVIL ACTION tried at Spring Term, 1884, of DAVIE Superior Court, before *Gilmer, J.*

This was an action brought by plaintiffs as the assignees of Milton Gaither, guardian of plaintiffs, against Casper Sain, Sr., administrator *de bonis non* of H. B. Holman, deceased, defendant, upon a judgment *quando* at fall term, 1869, in favor of Milton Gaither as guardian of plaintiffs, against B. Bailey, administrator of H. B. Holman, and an absolute judgment rendered at the same time in the same action against Beal Ijames, who is not sued in this action.

The plaintiffs offered in evidence a notice in writing given by the plaintiffs, and served 4th day of October, 1881, by the sheriff of Davie county on the defendant, administrator, notifying him that a motion would be made before His Honor, M. L. Eure, the judge then riding the 7th judicial district, at his chambers in Wilkesboro, on Friday the 14th of October, 1881, for leave to bring an action upon the judgment above described. The judgment, it was alleged, had become dormant, and no part of the same had ever been paid, and plaintiffs were the assignees and owners of the same, and defendants liable therefor.

And plaintiffs also offered in evidence the order of the judge by which it appears that the plaintiffs' said motion was heard by him upon the affidavits of plaintiffs, and that it was adjudged "that plaintiffs have shown good cause before me for suing on the former judgment, rendered in Davie superior court, in the case of Milton Gaither, guardian, against B. Bailey, administrator of H. B. Holman, deceased, and which was assigned to plaintiffs for value, and I adjudge and order that plaintiffs, F. M. Gaither, Z. T. Gaither, A. A. Dyson and wife, and others, assignees, have leave to sue upon said former judgment," which said order was signed by the judge.

The court held that proper notice has been given and due leave obtained to bring this action.

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Plaintiffs then offered to show that letters of administration upon the estate of H. B. Holman, deceased, were duly granted to B. Bailey, the first administrator, prior to the year 1860, and to offer other proof in support of the action.

But His Honor having intimated the opinion that plaintiffs' judgment was barred by the statute of limitations, as more than ten years had elapsed between the date of its rendition and the commencement of this action, or notice of motion for leave to sue, the plaintiffs in deference thereto submitted to a nonsuit and appealed.

Messrs. Clement & Gaither, for plaintiffs.

Messrs. Watson & Glenn and *J. A. Williamson*, for defendants.

MERRIMON, J. The intestate of defendant died, and letters of administration upon his estate were granted, prior to the year 1860, to one Bailey, who was afterwards removed and the defendant appointed administrator *de bonis non*. The judgment *quando acciderint* sued upon was granted at fall term, 1869.

The court below seems to have entertained the erroneous impression that this action is governed by the statute (THE CODE, § 152) which bars actions upon judgments and decrees of any court, after ten years next after the date thereof.

THE CODE, § 136, provides that Title III of the Code of Civil Procedure, entitled "Limitations of Actions," shall not extend to actions commenced before the 24th day of August, 1868, nor when the *right of action* accrued before that date, but the statutes in force previous to that date shall be applicable to such actions and cases.

Now the right of action in this case accrued long before 1868. It seems however that the court supposed the *quando* judgment sued upon, although founded upon a right of action that accrued before that time, was itself a new *causa*

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litis, and therefore the action was barred after ten years. If so, this was a misapprehension of the law in that respect. That was not a final judgment that might be sued upon as a new cause of action: it was conditional and interlocutory in its nature, and stood open to be completed—made final and absolute when assets should go into the hands of the administrator: and this should be ascertained and made to appear by a proper proceeding. Under the common law method of procedure, this was done by *sci. fa.*; under the code-method of procedure, as it prevails in this state, it is done by action, as the plaintiffs are seeking to do in this case.

The purpose of the present action is to charge the administrator with assets that have come into his hands since the judgment *quando* was given, and obtain a final judgment upon a right of action that accrued prior to 1868. It is an action that takes the place of, and is a substitute for the *sci. fa.* proceeding in like cases. Bing. on Judgment, 3, 90, *et seq.*, and as to form of judgment *ib.*, 331; *Rountree v. Sawyer*, 4 Dev., 44; *Henderson v. Burton*, 3 Ired. Eq., 259; *Lash v. Hauser*, 2 Ired. Eq., 489; *Dancy v. Pope*, 68 N. C., 147; *Ray v. Patton*, 86 N. C., 386; *Rogers v. Grant*, 88 N. C., 440.

We may add that the views thus expressed are in harmony with the provisions of the statute (THE CODE, §§ 1433, 1476) which provide that estates whereof administration had been granted before the first day of July, 1869, "shall be dealt with, administered and settled according to the law as it existed just prior to the said date." There was no statutory bar as the court intimated.

There is error. The nonsuit must be set aside and the case reinstated and disposed of according to law. To that end, let this opinion be certified to the superior court. It is so ordered.

Error.

Reversed.

 BAKER v. RAILROAD.

G. S. BAKER, Adm'r, v. RALEIGH AND GASTON RAILROAD COMPANY.

Executors and Administrators—Negligence—Railroads—Damages.

1. An administrator who recovers damages of one for negligently causing the intestate's death, holds the fund solely for the use of those entitled under the statute of distributions, and free from the claims of creditors and legatees (THE CODE, § 1500), subject, however, to commissions and reasonable counsel fees.
 2. The portion of the recovery due the widow in this case, released to the defendant, is chargeable with its share of such expenses, and the defendant gets no benefit under the assignment until the *pro rata* amount thereof is ascertained and paid.
- (*Love v. Love*, 3 Ired. Eq., 104; *Filhour v. Gibson*, 4 Ired. Eq., 455; *Outlaw v. Farmer*, 71 N. C., 31; *McNeill v. Farmer*, 83 N. C., 504, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1884, of NASH Superior Court, before *Shepherd, J.*

The plaintiff, as administrator of Duffin Perry, brings this action under the act of April 6th, 1869, against the defendant company for the recovery of damages for causing the death of his intestate, a passenger on one of its cars, by reason of the negligent running and mismanagement of its trains in charge and under control of its officers and employees. The defendant in its answer denies the imputed negligent running of its trains, declares that the intestate's own negligence contributed to his injury and death, and in a supplemental answer sets up a release from one Alice Perry, the widow of the intestate, of her moiety of the claim of damages asserted in the action.

At fall term, 1883, the cause was referred to arbitrators, who made and reported their award at the succeeding term as follows:

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"Herein the undersigned, arbitrators, award that the plaintiff recover of the defendant fourteen hundred dollars damages and the costs of this action. And the undersigned further award that Alice Perry, widow of the deceased, has assigned and released her interest in the estate of the said Duffin Perry to the defendant, and that the defendant is subrogated to her rights in the distribution of said estate."

(Signed by W. T. Dortch, Walter Clark and C. M. Busbee, arbitrators.)

No exception was taken to the report, and thereupon the defendant paid over to the plaintiff, without prejudice to the action, the sum of seven hundred dollars, on account of the other distributee.

On the plaintiff's motion for judgment upon the award for the moiety due to Alice Perry, the defendant insisted that the award "should stand released save for reasonable counsel fees and expenses incurred prior to the notice of release given the plaintiff, such sum to be ascertained by the court or by a reference."

The court refused to do this and "adjudged that the defendant should pay to the plaintiff the seven hundred dollars for Alice Perry's half interest in the recovery," and thereupon the defendant appealed.

Messrs. Joseph J. Davis and A. M. Lewis & Son, for plaintiff.

Mr. Walter Clark, for defendant.

SMITH, C. J., after stating the case. The statute which authorises the action to be brought by the personal representative of the deceased declares and directs that the amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this act for the distribution of

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personal property in case of intestacy. THE CODE, ch. 33, § 1500.

The administrator thus occupies the place of trustee, for a special purpose, of such fund as he may obtain by the suit, holding it when recovered solely for the use of those who are entitled under the statute of distributions, free from the claims of creditors and legatees, and subject only to such charges and expenses, inclusive of counsel fees and his own commissions, as may have been reasonably incurred in prosecuting and securing the claim. Diminished by these deductions, the remaining duty is to pay over to the distributees. The cases cited in the brief of appellant's counsel, *Love v. Love*, 3 Ired. Eq., 104; *Filhour v. Gibson*, 4 Ired. Eq., 455; *Outlaw v. Farmer*, 71 N. C., 31, and *McNeill v. Farmer*, 83 N. C., 504, sustain his contention that a court of equity will interpose and prevent a recovery upon a mere legal title, where the party has no trust to discharge or duty to perform except to deliver or pay over to the one whom he owes. Why should a fund be collected from a person to whom it is at once to be returned or paid after the plaintiff gets it?

But the moieties due to the equitable owners of money must bear their equal parts of the charges and expenses rendered necessary in securing it, at least up to the period when the share of the said Alice Perry was released to the defendant and notice given the plaintiff. The residue belongs to the defendant, and there is no reason why it should be required to be paid, when it must be returned.

The judgment was therefore properly entered up against the defendant for the unpaid share of Alice, to which the defendant had succeeded as the arbitrators decide, not to be enforced, but to stand as a security for such sums as ought to be deducted for its share of said charges and expenses, and charged therewith. Meanwhile, it should not be enforced until the proper sum with which it should be charged

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is ascertained. Then execution should issue with direction that it be discharged by payment of the sum thus ascertained, and, when paid without execution, that a perpetual order of *cessat executio* be made. This secures the substantial rights of all parties in interest.

We premit the expression of an opinion as to the charge for professional services, except that it should be of reasonable amount, for this inquiry is not before us in this appeal.

There was no error in the refusal of the court to make any further order, after the judgment, for the purpose of ascertaining what amount should be deducted before the defendant gets the benefit of the assignment, and meanwhile suspending the issue of process to enforce full payment, unless, which is not suggested, there should be danger of losing the debt. In such case, the fund might be collected and paid into court and there held to await the results of the proposed inquiry.

The judgment is affirmed and to the end that further proceedings be had in accordance with this opinion, let it be certified. The appellant is entitled to the costs of the appeal.

Modified and affirmed.

JOHN E. GADSBY and others v. JOHN DYER and wife.

*Evidence and Declarations in Ejectment—Impeaching Witness—
Title, registration of deed—Fraud.*

1. In an action to convert a deed absolute upon its face into a mortgage, the declarations of the grantor that he owed the grantee

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money and wished to sell the land to pay it, made after the deed was executed and while he was in possession of the *locus in quo* jointly with the grantee, are incompetent.

2. One cannot introduce evidence to discredit his own witness, yet if a witness testify to facts which make against the party who called him, the party is not precluded from showing these facts to be otherwise, notwithstanding such evidence has the effect of indirectly impeaching his own witness.
 3. The title of a grantor is divested from the time of the delivery of the deed which is subsequently registered.
 4. Heirs can only attack a deed of their ancestor for fraud or undue influence used in bringing about its execution; and in such case, only such declarations as tend to prove such fraud or undue influence, made after the conveyance and with unchanged possession, are received. Or, such declarations may be proved in disparagement of the title inferred from possession and use.
 5. Where two parties are in possession of land, the possession in law follows the title.
 6. Declarations made in the absence of the party to be prejudiced by them are not admissible as against such party.
- (*Spencer v. White*, 1 Ired., 236; *Shelton v. Hampton*, 6 Ired., 216; *Hice v. Cox*, 12 Ired., 315; *Kirby v. Masten*, 70 N. C., 540; *Yates v. Yates*, 76 N. C., 142; *Hilliard v. Phillips*, 81 N. C., 99; *Roberts v. Roberts*, 82 N. C., 29; *Sutliff v. Lunsford*, 8 Ired., 318; *Whitesides v. Twitty*, *Ib.*, 431; *Straus v. Beardsley*, 79 N. C., 59, cited and approved).

EJECTMENT tried at Spring Term, 1884, of NEW HANOVER Superior Court, before *Shepherd, J.*

The plaintiffs claimed the *locus in quo* as the heirs-at-law of one George Gadsby, and it was conceded that they were his heirs-at-law. The defendants claimed under a deed dated the 7th of November, 1850, executed to defendant Elizabeth by the said George Gadsby. The facts appear in the opinion.

There was a judgment in favor of the defendants, and the plaintiffs appealed from the judgment rendered.

Messrs. MacRae & Strange, for plaintiffs.

Messrs. Russell & Ricaud, for defendants.

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SMITH, C. J. The deed made on November 7th, 1850, by George Gadsby, the former owner, to his sister, the *feme* defendant, Elizabeth, conveying the lot of land described in the complaint, is impeached by the plaintiffs, his heirs-at-law, and its validity denied upon the ground of an alleged want of legal capacity, or of undue influence exerted over an enfeebled mind by the said Elizabeth.

Upon the coming in of the answer denying these charges, and upon the evidence developed upon an ineffectual trial (in which the jury were discharged) of the issues then arising, the plaintiffs obtained leave and filed an amended complaint, and alleged that the deed was not executed as an absolute conveyance upon the consideration recited, but as a mortgage, so intended by the parties, to secure a loan of money advanced by the said Elizabeth, and its registration fraudulently suppressed, and they demand that the conveyance shall stand as a security for such sum as may have been loaned, to be ascertained upon an inquiry, and that they be allowed on payment to redeem the premises.

The matters in controversy were laid before the jury in the form of three issues, which, with the responses, are as follows:

1. Is the said deed the act and deed of George Gadsby?
Answer—Yes.

2. When was the deed executed? Answer—Seventh day of November, 1850.

3. Did the said Elizabeth Dyer lend any money to George Gadsby, and if so, how much, and was the deed mentioned in the pleadings given to secure the said loan as the consideration therefor? Answer—She did not loan him any money.

Upon the trial and before the examination of the said Elizabeth, who testified on her own behalf, the plaintiff introduced one George Lamb, and proposed to prove by him, that he was examined as a witness on her behalf (on a for-

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mer trial) to prove that between the years 1850 and 1855, the said George Gadsby offered to sell the property in dispute to the witness, stating at the time that he had borrowed money from his sister, and wanted to sell the lot to raise money to pay her back.

It being conceded that both parties to the deed were in actual possession of the lot when the declarations are alleged to have been made, the court refused to hear the testimony, and the plaintiffs excepted.

After the examination of the said Elizabeth, the same evidence was again offered for the purpose of contradicting the plaintiffs' alleging as a ground for its admission that they had made no objection to her examination.

The admissibility of these declarations was urged :

1. For the purpose of estopping the defendants from showing the contrary ;

2. As made while the declarant remained the owner of the lot, the estate therein not being divested until the registration of the deed in June, 1856 ; and

3. As to declarations accompanying a continued and uninterrupted possession of the premises.

We do not give our assent to the sufficiency of any of the reasons assigned in support of the competency of the proof.

1. If the same testimony, now proposed to be reproduced, had been elicited from witnesses produced and examined by the defendants on the present trial, the defendants would not be estopped from showing, by others, a different state of facts ; for the testimony of no one or more witnesses precludes the party who introduces them from proving the contrary, and this, notwithstanding the indirect impeachment of their credibility in the repugnance of their evidence. This is not in violation of the rule that a party cannot discredit his own witness. *Spencer v. White*, 1 Ired., 236 ; *Shelton v. Hampton*, 6 Ired., 216 ; *Hice v. Cox*, 12 Ired., 315.

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Still less can such a result be ascribed to the examination of a witness for the defendants on a former, who is not introduced at a subsequent trial, where he is not accredited as truthful to the jury.

Nor was the evidence admissible as a declaration of the owner, made before his conveyance had become effectual by registration. His title was divested from the time of the delivery of the deed, when it was subsequently registered, as effectually as if registered immediately upon delivery.

The third and last ground upon which its reception is based is equally untenable.

The plaintiffs are not impeaching creditors; and declarations made after a conveyance and with unchanged possession have only been received to prove fraud in the making of the deed, which the heirs-at-law are not permitted to show; for they can only show fraud practiced upon him, or undue influence exercised in bringing about the execution, not fraud intended to be perpetrated by himself; or, such declarations may be used in disparagement of the title to be inferred from possession and use. *Kirby v. Masten*, 70 N. C., 540; *Yates v. Yates*, 76 N. C., 142; *Hilliard v. Phillips*, 81 N. C., 99; *Roberts v. Roberts*, 82 N. C., 29.

But the case states that both parties to the deed were in actual occupation of the premises. The possession would in law follow the title, and be adjudged to be in the *feme* defendant, so that the case is not one in which a party has conveyed his land and retains possession as before.

The subsequent offer to prove the former testimony was also properly refused. The *feme* defendant was not present when the declarations were alleged to have been made by the deceased, so as not to be supposed to have acquiesced in what was said by silence, and in this aspect she cannot be prejudiced by the utterances of her brother. Nor does it appear what was the testimony of herself which this proof would contradict or disparage. We cannot see any conflict

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between their statements, and unless it should appear, we cannot discover any error in the exclusion.

It is the duty of the appellant who complains of the rejection of evidence to show its pertinency and bearing, in order that it may be seen that error has been committed. *Sutliff v. Lunsford*, 8 Ired., 318; *Whitesides v. Twitty*, *Ib.*, 431; *Straus v. Beardsley*, 79 N. C., 59.

The other defects pointed out in the argument for the appellee, and the insufficiency of the allegations in the complaint in showing a cause of action, we do not deem necessary to consider, since we find no error in the rulings of which the plaintiffs can complain, and our affirmation of the judgment disposes of the case.

No error.

Affirmed.

*E. R. STAMPS, Trustee, v. G. M. COOLEY and others.

*Landlord and Tenant—Lease, provision of—Contract—Equity,
relief by—Agency.*

1. A lease provided that, in case the lessee quit the premises during the term, or failed to pay the rent reserved, the improvements put on the premises by the lessee should become the absolute property of the lessor; and also, that at the expiration of the term the lessee should have the right to remove all the improvements put up by him upon complying with all the terms of the lease. The lessee failed to pay rent, and the lessor entered and took possession of the improvements; *Held*, in an action by the lessee for a violation of the provision allowing the removal of the improve-

*Mr. Justice MERRIMON having been of counsel did not sit on the hearing of this case.

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ments, that he could not recover. A party exercising a legal right under a contract cannot be subjected to an action for damages for asserting it.

2. Equity never relieves against a penalty for the purpose of allowing an action for damages; so, in this case, if the forfeiture of the improvements be a penalty, equity will only relieve to the extent of allowing the lessee to remove them.
3. Where a party contracts as "agent" without disclosing his principal, *quære*, whether it is not his personal undertaking and to be so construed, although a jury find that he contracted as agent and not as principal.

CIVIL ACTION, tried at Fall Term, 1884, of WAKE Superior Court, before *Gudger, J.*

The action is to recover the value of certain improvements put upon a lot in the city of Raleigh.

Verdict and judgment for plaintiff, appeal by defendants.

Messrs. Rsade, Busbee & Busbee, J. W. Hinsdale, R. T. Gray and John Devereux, Jr., for plaintiff.

Messrs. Pace & Holding, Fuller & Snow and E. C. Smith, for defendants.

SMITH, C. J. The defendants, owners of a lot in the city of Raleigh, on September 11th, 1876, entered into an agreement with Timothy F. Lee, who affixes the word "agent" to his name in the beginning, and to his signature at the end of the instrument without further designation, for a lease of the lot for the term of five years, beginning on the first day of the next month, at an annual rent of \$325, equal parts whereof were to be paid by the lessee at the end of each month, as it became due. The lessee contracts to surrender the premises to the lessors, defendants in this action, at the expiration of the term upon failure to pay the stipulated rent, in as good condition as when he enters into possession, to pay any excess of tax that may thereafter be levied over

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that levied in 1876; and further, "that all improvements he, the said T. F. Lee, shall make or put, or cause to be put on said lot or property, shall be bound for the payment of rent and taxes as above, with no right of said T. F. Lee to remove any of the said improvements from the premises, on his failure to pay as above, all of which shall become the property of the said Freeman and Cooley, upon the said T. F. Lee's failing to comply with the requirements of this lease."

The agreement after providing for the restoration of possession upon the lessee's neglect to pay the rent and excess in taxes, or his committing waste on the premises, contains this further clause :

"It is further understood and agreed that the said T. F. Lee shall have the right to remove such improvements as he may put on said property at the expiration of the lease, and his complying fully with the terms of the lease; *provided, however*, that no improvements shall be removed which would injure by such removal the property as it was before such improvements were made; and *provided further*, that all the improvements the said T. F. Lee shall put on said lot and property shall be and become the full and absolute property of the said Freeman and Cooley, should the said Lee quit the premises before the expiration of the lease."

"It is further understood and agreed that during the lease the said Lee shall have no right to remove any improvements put on said premises without consent of the parties of the first part (the lessors) obtained in writing."

The other provisions of the agreement are not material to the consideration of the matters involved in the appeal.

Under this arrangement Lee took possession of the lot, and, while using it, added to the capacity of the building, enlarging it from four to eleven rooms and made other improvements of considerable value, when after several years' occupation he surrendered the lot to C. L. Harris for the

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wife of said Lee and in the spring of 1881 left the state for New Mexico. Rent was paid up to July of that year, since which none had been paid, when the defendants in summary proceedings against Lee, then absent, recovered judgment and under a writ of possession re-entered upon the lot, on the last day of September. On the same day a tender in writing was made by the attorney of the lessee, and a demand made for the return of possession in order that in a reasonable time thereafter the structures erected by the lessee might be taken away, he, the attorney, having then in gold coin a sum sufficient to discharge all due from the lessee.

The offer was declined, accompanied with the requirement for a surrender of the premises for the purposes aforesaid, but a willingness expressed to accept the rent as a separate proposition.

Thereupon the present suit was instituted for the recovering in damages the value of the improvements thus appropriated by the lessors.

Upon issues submitted to the jury, they find that Lee executed the agreement for the lease as agent for his wife V. B. Lee; that the rent due was \$70.00 and the damages sustained by the lessee in being deprived of the opportunity of removing the improvements \$1200.00, upon which sum is allowed interest from October 1st, 1881.

The action, as we understand the case made in the complaint, is brought upon the contract and for a violation of that provision in it which gives the right of removal of the structures built by or for the lessee, under the conditions prescribed, and the damages demanded are for the loss incurred in the denial of the right.

We premit an inquiry suggested upon an examination of the instrument creating the lease, whether the agreement in terms and upon its face does contain the individual obligation of the agent and so to be construed, notwithstanding the jury finding; and whether, if in fact made in be-

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half of an undisclosed principal, it may not be still treated as the personal undertaking of the agent, as the authorities seem to indicate. Story Agency, §, 267.

Waiving these difficulties and accepting the agreement as that of the alleged principal and to be binding, it is plain that the defendants in taking possession, given under the sanction of law, have only availed themselves of a right reserved in the contract to take back their property in its improved state upon breaches of the imposed conditions. The lease has an express provision that the new erections put up by the lessee, primarily for his own use, shall be bound for rents and excess in taxes, with no right in the lessee to remove any of them, "*on his failure to pay, as above, all of which shall be and become the property of the said Freeman and Cooley upon the said T. F. Lee's failing to comply with the requirements of this lease,*" among which is the obligation to pay punctually the accruing rents.

The lessee did not pay the rents due after July, and was in consequence ejected on the last day of the term.

The right to resort to this stringent measure of redress, upon breach of the contract is reserved to, and has been exercised by the lessors. The right of removal is not absolute, but is qualified and can be asserted only on "compliance with the terms of the lease," and hence not open to the lessee.

It is difficult to conceive how a party exercising a legal right, secured under contract, can be subjected to an action for damages for asserting it. It is a contradiction in terms that a right in the lessee is violated when the owners enter upon their lot by virtue of legal process after an adjudication against a party wrongfully holding, and in conformity with the terms of their lease.

But the plaintiffs contend that this provision that the lessors shall have the valuable structures put up before any failure to pay the rent, is but a penalty to secure it,

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against which equity will give relief, and therefore this action may proceed as if it was put out of the way.

This may perhaps be regarded as a forfeiture intended only as a security to the lessors, against which the equitable powers of the court may be invoked, but until its interposition is asked in a proper proceeding, the matter remains as at law and depends upon legal principles. But a court of equity will not interfere for the mere purpose of exposing a party to an action for damages; nor, until it does so interfere, can the alleged forfeiture be treated as a nullity. Where application is addressed to the equitable jurisdiction of the court for relief against a penalty or forfeiture, which it is against conscience to enforce, the means of redress at law are gone, and the court undertakes to dispose of the controversy and do justice to both parties, upon principles peculiar to its own mode of judicial procedure. It puts the legal obstacle out of the way, regards the real purpose of all in imposing the penal forfeiture, and requires both to do what they ought to have done. In the present case the invoked interposition would be in allowing further time to the lessee to make the separation and removal on his paying all that was due; and, if the removal had become impracticable, to give him in money the value of the privilege which had been lost. In ascertaining the amount of this sum, the inquiry would be, not how much in value the lot had been enhanced by the improvements, or how great the advantage to the owners, but how much has the defendant lost in being refused an opportunity to sever and remove them on the terms mentioned in the contract.

The suggestion is a novel one that because the forfeiture, if indeed it be a mere forfeiture, is one which a court of equity, when asked, would give relief against, it may be regarded as put out of the way and so admit a recovery in damages for an act lawfully done under the contract.

It may be that the form of the complaint may admit of

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the measure of relief afforded in equity against the enforcement of such a forfeiture, or if not, that it might be so amended as to be such an application. But the cause has not been prosecuted, as if seeking such remedy, but in the form of an action at law, as for a violated agreement.

For the erroneous rulings in contravention of the law as declared in this opinion, the judgment must be set aside and a new trial ordered, and it is so adjudged. Let this be certified.

Error.

Venire de novo.

 FANNIE WILLIAMS and others v. CYNTHIA CLOUSE.

Judgment—Estoppel of Record.

1. A judgment in a former action, to operate an estoppel, must be between the same parties and directly rest upon the precise issues and matters in difference in the second action. *Temple v. Williams*, ante 82 (3).
2. A rule which declares that a judgment is conclusive of every thing that *might* have been litigated in the action must be interpreted as applying only to the particular issue or matter *actually* determined therein.

(*Baird v. Baird*, 1 Dev. & Bat. Eq., 524; *Armfield v. Moore*, Busb., 157, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1884, of DAVIE Superior Court, before *Gilmer, J.*

It appears that the plaintiff, Fannie Williams, and the defendant and H. C. Eccles formed a partnership for the purpose of keeping a hotel in the town of Charlotte, in this state, to continue from the 1st day of January, 1870, for

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three years next thereafter, and that they did such business for that length of time.

It is alleged by the plaintiff that the business affairs of that partnership were settled so far as the defendant was interested, except that she (the defendant) received from the partnership in the years 1870, 1871 and 1872 \$1,984.06, while the plaintiff received the sum of \$305.45, and that H. C. Eccles transferred all his interest in the accounts of the partnership to the plaintiff, and that she has requested the defendant to pay to her the sum of money due her on account of the difference between the sum of \$1,984.06 and the sum of \$305.45, which the defendant refused to do, and the plaintiff demanded judgment for \$1,258.30, with interest thereon from January 1st, 1873.

The defendant denies the material allegations in the complaint, and insists that this action ought to be brought, if at all, to settle the partnership affairs, and cannot be maintained as to a single item incident to such settlement. The defendant pleads the statute of limitations, and further, that the partnership expired by its own limitation, and that all its business affairs were settled and closed as between the several partners in an action for that purpose in the superior court of the county of Davie, on the 15th of March, 1873, and afterwards removed to the superior court of the county of Rowan, and determined in that court, and that the judgment in that action estops the plaintiff to make the claim alleged in her complaint, or any claim whatsoever in respect to the partnership matters.

On the trial the defendant put in evidence a transcript of the record in the action determined in the superior court of Rowan county, from which it appears that Charles Price and Fannie Williams, (the plaintiff in this action) and the present defendant, brought their action against the said H. C. Eccles, alleging the said partnership, its terms, the manner of conducting the business of the same; that the

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said Eccles was the chief manager; that certain contributions of money were to be made by each partner; that certain contributions were made; that the defendant Eccles had mismanaged the business and damages had thereby been sustained by the partnership; that it did a large and flourishing business most of the time, realizing large profits, which the said defendant received, &c.; and demanding judgment, "that an account be taken of said partnership business and of all moneys arising therefrom, which have or ought to have been received by the defendant, and that if upon taking this account it should be ascertained that net profits have been made from such business, the defendant shall be adjudged to pay plaintiffs their proportion thereof, to which they are entitled under the terms of the partnership aforesaid."

The defendant in that action (Eccles) denied that the said E. D. Hampton, whom the said Price represented as assignee, was a partner as alleged in the complaint, but he admitted that himself and Fannie Williams and Cynthia Clouse composed the partnership; he admitted many of the allegations in the complaint, and denied others, and alleged an accounting and a final settlement theretofore of the affairs of the partnership, and pleaded the same.

It further appeared from that record that there was a motion for a reference for an account of the partnership dealings, but the motion was "allowed only as to the list of notes and accounts, alleged by defendant Eccles to have been left in his hands on the settlement set up by him, and motion refused as to a general account on any matters preceding the alleged settlement."

From so much of this order as refused a general account, the plaintiffs took an appeal to the supreme court, and that court held there was error, and that no account could be ordered until the issue raised by the pleadings as to the

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alleged settlement should be tried. *Price v. Eccles*, 73 N. C., 162.

After that, "under a compromise between the parties in this suit, and in No. 35, same plaintiffs against R. M. Oates and others, embracing all matters between said parties; it is now, on motion of W. H. Bailey, counsel for plaintiffs, adjudged that plaintiffs Charles Price, assignee, Cynthia Clouse and Fannie Williams, recover of the defendant, H. C. Eccles, two hundred and fifty-five dollars, and that each party pay his own costs in this cause and in No. 35, to be taxed by the clerk." This was the final judgment in that action.

It appears that E. D. Hampton was not a member of the partnership, and so, that neither himself nor the said Charles Price was a proper party to the action above referred to.

There was evidence tending to show a settlement of the partnership matters before the action above mentioned, and likewise evidence tending to show that such settlement was only partial.

The court intimated the opinion that the plaintiff in this case could not maintain her action, thereupon she excepted and submitted to a nonsuit, and appealed.

Messrs J. M. McCorkle and J. A. Williamson, for plaintiffs.
Messrs. Clement & Gaither, for defendant.

MERRIMON, J., after stating the case. It seems that the court below based its intimation that the plaintiff could not sustain her action upon the ground that the judgment in the action determined in the superior court of Rowan county, wherein she and the present defendant were plaintiffs, and H. C. Eccles was defendant, operates as an estoppel of record upon her as to her present alleged cause of action. At the argument, we were much inclined to think so, but a

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careful examination of the record in that action leads us to a different conclusion.

It is true, the action referred to was brought for the purpose of settling the affairs of the partnership as between the several partners. This appears from the allegations and scope of the complaint, and also from the demand therein for judgment, and as well from the motion for the reference and a general account, which the court refused to grant. But the present plaintiff and defendant, both plaintiffs in that action, alleged specially, that the defendant therein, their co-partner, H. C. Eccles, had chiefly managed the business of the partnership, received the receipts and income thereof, and, in some respects, mismanaged its business, whereby it had been endamaged; and one purpose of the action was to compel him to account to the plaintiffs in that action specially, as well as the general purpose thereof to compel a general account and settlement *inter partes*. The record in that action shows, that no reference for an account therein was made; that no account was taken: that there was no accounting or settlement between the plaintiffs themselves; and it also appears therein that the defendant Eccles alleged in his answer, as matter of defence, that there had been a settlement of the partnership affairs before that action was begun, and it further appears that he agreed, as the result of a compromise, to pay the plaintiffs the sum of \$255, in order (as he testified in this action) to rid himself of the action and all further liability and annoyance on account of the partnership. He consented that a judgment might be entered against him for that sum in favor of the plaintiffs; such judgment was entered, and thus the action terminated.

Now, it cannot be questioned, that where a matter of litigation between two or more parties has been duly settled by a judgment or decree in an action properly instituted by one of such parties against the other, that such judgment

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or decree operates as an estoppel of record upon such parties and their privies, whenever the same matter shall be called in question in any subsequent litigation. As to all material allegations of the record upon which issue has been taken and found, and all matters settled and embraced by the final judgment or decree between the parties to the action, the record is conclusive upon them, according to its legal force and effect, and operates to estop them from again litigating the same fact or matter, so determined. As for example, if a fact be agreed upon by the parties to an action and this be entered of record, or a fact be found by verdict, and the court takes action therein and pronounces judgment or a decree, neither of the parties can ever afterwards deny that fact, so long as the judgment or decree remains unreversed. The doctrine of estoppel is essential in the administration of justice: without it, there would be no stability in judicial proceedings, no end of litigating the same cause of action, and there would be universal confusion and distrust.

But the judgment or decree, to have such effect, must be direct, and rest upon the precise issues and matters litigated and settled.

If it appear on the face of the record, that the main purpose of the action was not tried or passed upon, and that the judgment does not embrace it in terms or by necessary implication, as to such matters there can be no estoppel. It is indeed, sometimes vaguely said that a judgment or decree is conclusive of every thing that *might* have been litigated and settled in the action, but this statement is far too broad, unless it be taken as applying to the particular issue or matter actually litigated and determined, and such matters and things necessarily implied by them. *Baird v. Baird*, 1 Dev. & Bat., 524; *Armfield v. Moore*, Busb., 157; *Temple v. Williams*, ante 82; *Russell v. Place*, 94 U. S. Rep., 606; 2 Smith L. C., 573, (4 Am. Ed.) Big. on Estoppel, 103.

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It appears from the record pleaded as an estoppel, that Eccles gave the plaintiff and defendant in this action (his co-partners) a judgment for \$255.00, to relieve and discharge him from all further liability to account to them as their co-partner, and this was the only matter settled by the judgment, and so to that matter it operates as an estoppel upon the plaintiff and defendant in this action; but that judgment does not purport to have been a settlement of the rights of the plaintiffs in the action in which it was given, as between themselves. They did not account with each other as partners or otherwise. And it seems that as to themselves, the action was practically abandoned. The judgment therefore does not conclude the plaintiff in favor of the defendant in this action as to the partnership affairs.

The allegations of the complaint are vague and unsatisfactory. They ought to be made with much precision. It may be, as is imperfectly alleged, that the plaintiff and defendant settled the partnership accounts, as between themselves, except as to the single item mentioned in the complaint; or it may be, that as to this, the plaintiff's demand is barred by the statute of limitation; or it may be, that the plaintiff and defendant have not settled the partnership affairs as between themselves, the other partner Eccles having purchased from them his acquittance in that respect. As there was no estoppel, the action ought to have been tried upon its merits, apart from that supposed defence.

There is error. The judgment of nonsuit must be set aside, the action reinstated, and further proceedings had therein according to law. Let this opinion be certified to the superior court. It is so ordered.

Error.

Reversed.

SHELTON v. SHELTON.

*CATHARINE G. SHELTON v. SARAH L. SHELTON.

New trial where judge goes out of office.

The ruling in same case 89 N. C., 185, approved, to the effect that where a judge goes out of office before settling a case on appeal, a new trial will be awarded unless the parties afterwards agree upon a statement of the case.

EJECTMENT tried at Spring Term, 1882, of CHEROKEE Superior Court, before *Gilliam, J.*

Mr. Armistead Jones, for plaintiff.

No counsel for defendant.

ASHE, J. Judgment was rendered in the superior court in behalf of the defendant, and the case was brought to this court at October term, 1882, by the appeal of the plaintiff. And at February term, 1883, a petition for a writ of *certiorari* was filed by the appellant, based upon her affidavit setting forth the grounds of the application. Upon the hearing of the petition at October term, 1883, this court made the following order:

"The facts disclosed in the affidavit of the plaintiff's counsel, to which no opposing evidence is offered, are, that separate statements of the case on appeal, prepared for the respective parties, were delivered to the judge who tried the cause for his adjustment of the differences between them. He transmitted to the clerk a statement of his own, omitting one or more of the appellant's exceptions to the rulings which were intended to be brought up for review, without giving notice to the parties or affording them an opportu-

*Mr. Justice MERRIMON having been of counsel did not sit on the hearing of this case.

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nity of being heard before his final action. The retirement of the judge from office prevents the perfecting the appeal in the mode prescribed by the statute, and would, in the absence of any case, render unavoidable the award of a new trial. This necessity may be avoided by the appellee's assent to the filing of the appellant's case, as part of the record, and the appeal then heard upon it. We therefore grant the application for the writ of *certiorari*, to the end that an opportunity may be afforded to the parties to file the appellant's case, without addition or change, to come with the record, in response to the requirements of the writ, and this can only be with the assent of the appellee. Let the writ issue as prayed for on the terms prescribed by law."

The writ of *certiorari* was accordingly issued to the clerk of the superior court of Cherokee county, who at the February term of this court, made return of said writ, as follows:

"Catharine G. Shelton v. Sarah L. Shelton":

"In obedience to an order issued from the supreme court of North Carolina in the above entitled cause, I have notified the parties in said cause, and the defendant objected to any amendment or change of the record, as the transcript heretofore sent up to the supreme court is a true and complete record of said cause as appears of record in this office. February 18th, 1884." (Signed by the clerk).

As the defendant has declined to accept the terms offered in the order granting the writ of *certiorari*, a new trial is awarded. This must therefore be certified to the superior court of Cherokee county, that a new trial may be had.

Venire de novo.

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J. A. YOUNT v. FRANK MILLER.

Presumption of Grant—Lapse of time and acquiescence of adverse parties supply lost records in making up title—

Evidence—Dower.

1. A party who relies on thirty years' adverse possession to presume a grant, is not bound to show that he and those under whom he claims held the possession and claimed the land up to visible boundaries, under the law as it existed when this action was brought.
2. The title to a widow's dower cannot be established by showing merely an entry on the docket and the report of a jury. But where the original papers in the proceeding for dower are proved to be lost, parol proof of their contents is admissible, in aid of her title; and the defects in the record are supplied by the presumption arising from the long possession (here thirty-six years) by the widow of the land described in the report, accompanied by the acquiescence of the heirs-at-law; and every matter connected therewith that can be reasonably presumed, has the force and effect of proof.
3. A long acquiescence of adverse parties in the possession of land by another, will warrant the court in assuming the existence and loss of record-links in making up his title, the lapse of time varying with the conditions under which the records were kept and the casualties to which they were exposed.

EJECTMENT tried at Fall Term, 1884, of CATAWBA Superior Court, before *Gilmer, J.*

On the trial the plaintiff introduced one Little as a witness, and handed him the plat made by the surveyor, and asked him if he was acquainted with the land represented therein. He testified he was well acquainted with all the land; and had been for forty or fifty years; that when he first knew the land Frederick Hope was in possession, and after him, John Yount succeeded to the possession fifteen or twenty years before his death; and that John Yount held

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land all around these lands, and Joshua A. Yount, the plaintiff, went into possession of a part thereof as the heir of John Yount; and that Lafayette Yount was an heir of John Yount and inherited the part claimed by defendant.

The plaintiff proved by M. O. Sherrill, former clerk of the court of pleas and quarter sessions, that the original papers in the case of Elizabeth Yount, widow of John Yount, for dower, against the heirs of John Yount, had been searched for by him, and were lost.

The plaintiff then, under objection by the defendant, offered in evidence the records of the minute docket of the court of pleas and quarter sessions, which were as follows:

"Original order, June, 1844: Elizabeth Yount, *Ex-parte*—Petition for dower—The clerk is appointed guardian *pendente lite* for the minor heirs of John Yount, deceased; acknowledges service of petition."

"December term, 1844: Elizabeth Yount against the heirs-at-law of John Yount—Petition for dower—Report filed and confirmed."

The report alleged to have been filed, and not disputed, was then produced, signed by twelve jurors, who allotted to the widow four hundred and fifty-four acres and a quarter of the land of John Yount, claimed to cover the *locus in quo*.

The preamble to the report was as follows: "We, the undersigned jurors attended at the house of Elizabeth Yount, widow, on the 26th day of August, 1844, and being legally qualified, proceeded to lay off and allot to Elizabeth Yount, widow, her dower and third interest in the lands of John Yount, deceased, her husband."

The plaintiff proved by the witness Little, that the widow Elizabeth was in possession of the land embraced in this report of dower, for thirty-six or thirty-seven years, and died in May, 1879.

He also offered in evidence the proceedings had in the

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superior court of Catawba, in a petition filed by P. L. Yount and others, including the plaintiff who were heirs-at-law of John Yount, against J. H. A. Yount, who was also one of the children and heirs of John Yount, for a partition of the land on which Elizabeth Yount lived. There was no objection to the introduction of this evidence.

Plaintiff also offered in evidence a deed from M. M. Smith and wife, to the plaintiff, Joshua A., dated 11th September, 1881, which covered and embraced the portion or share allotted to M. M. Smith and wife in said partition. It was also in evidence that Mrs. M. M. Smith was a daughter of John Yount, deceased.

Plaintiff then introduced as a witness Lafayette Yount, who testified that he was a son of John Yount, and that he had been in possession of the land claimed by defendant for twenty-six or twenty-seven years, and that the defendant succeeded him in the possession.

In order to estop the defendant from denying John Yount's title, the plaintiff offered a deed from Lafayette Yount to the defendant, dated 8th September, 1869, which said deed the defendant claimed covered the *locus in quo*.

1st Exception. The defendant asked the court to charge that unless the plaintiff and those under whom he claimed have had the land sued for, twenty-eight or thirty years, under known and visible lines and boundaries, the plaintiff could not recover. This was refused—the court holding that thirty years' actual adverse possession raised a presumption of a grant, whether there were visible boundaries or not. To this the defendant excepted.

2nd Exception. The defendant also asked the court to charge that as plaintiff had not shown that Lafayette held the land as heir-at-law of John Yount, no question of estoppel arises in this case. The court declined to give the instruction, and left it to the jury to say whether the plain-

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tiff had proved that Lafayette had inherited from John Yount the land in controversy. Defendant excepted.

3rd Exception. The defendant also asked the court to charge the jury that as the proceedings for partition of land which the plaintiff claims, (the land in dispute) show that the plaintiff claims as heir-at-law of Elizabeth Yount, the widow, the defendant's adverse possession had ripened into a perfect title before the death of Elizabeth Yount. The court declined to give the charge and defendant excepted.

The defendant disclaimed title to all the land sued for, except the *locus in quo*, and contended that he had been in the actual adverse possession of a tract of land covering the *locus in quo* with color of title for twelve years, and the plaintiff was thereby barred of a recovery.

There was a verdict for the plaintiff, and judgment accordingly, from which the defendant appealed.

Messrs. D. Schenck, Reade, Busbee & Busbee, and J. M. McCorkle, for plaintiff.

No counsel for defendant.

ASHE, J. The facts of this case are very vaguely and obscurely presented. And some of the important facts of the case, we have the opinion, were proved or admitted because no question was raised about them in the record. For instance, we must take it for granted that the land allotted to the widow for dower and the lot assigned to Smith and wife in the partition covered the *locus in quo*, and also that the deed made by Lafayette Yount to the defendant covered the same land, and that the defendant was in possession when the action was brought.

Beginning with these assumptions, which we think warranted by the record, we proceed to the consideration of the points of law presented.

The first instruction asked by the defendant was prop-

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erly refused by the court. There was no error in the charge. As the law stood at the time of the trial of this case, and as applicable to it, a party, who relied on thirty years' adverse possession to presume a grant, was not bound to show that he and those under whom he claimed had held the possession, claiming up to visible lines and boundaries. But even if that were so, it could not apply to this case; for here, it was proved that the land in controversy had been in the adverse possession of John Yount for fifteen years before his death, and in the possession of his widow for thirty-six or seven years after his death, claiming up to the lines defined in the allotment of dower, and then that John Yount had owned the lands all around there.

As to the second instruction asked, it was immaterial under the facts of the case, whether Lafayette Yount claimed the land conveyed by him to the defendant, by inheritance from John Yount, for as the land had been held by the widow and John Yount sufficiently long to presume a grant from the state, the inquiry whether the defendant was estopped to deny the title of John Yount became unimportant. But if not so, the question was very properly left to the jury, who had before them the testimony of the witness Little, who testified that Lafayette Yount was an heir of John Yount, and that he had inherited the part of the land claimed by defendant.

The third instruction asked was rather "begging the question." The court was asked to charge the jury that as the proceedings for partition show that the plaintiff claims the land in controversy as heir of Elizabeth Yount, the defendant's adverse possession had ripened into a perfect title before the death of Elizabeth. But the plaintiff in those proceedings did not claim the land as heir of Elizabeth Yount. The plaintiff and the other petitioners applied as tenants in common to have partition of the land, not that belonging to Elizabeth but that on which she lived. What

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land was that? Why the land that had belonged to John Yount, and after his death allotted by a jury of twelve men to the widow of John Yount for her dower. The bare statement of these facts is sufficient to force any sensible mind to the conclusion that they were claiming the land as co-tenants by inheritance from John Yount.

This brings us to the only important question presented by the record. The plaintiff insists that as the widow had dower assigned her in the land in controversy, his cause of action did not accrue until after her death in 1879, and the defendant contends that the evidence offered by the plaintiff to establish the dower of the widow was insufficient for that purpose, and that his adverse possession for more than seven years with color of title barred the recovery of the plaintiff.

These opposite and conflicting contentions of the parties narrows the case down to the question, whether the evidence offered by the plaintiff was sufficient to establish the fact that dower had been allotted to the widow, as contended by the plaintiff.

The entry on the docket and the report of the jury, standing alone, we do not think sufficient to establish the title of the widow to her dower, for there is no petition shown, no evidence of a writ issued to the sheriff commanding him to summon the jury, and no judgment confirming the report of the jury. But as the papers in the case, after search, are proved to have been lost, we think parol proof is admissible as secondary evidence in aid of the widow's title, and the defects in the record are supplied by the presumption arising from the long possession by the widow of the land described in the report, accompanied by the acquiescence of all the heirs-at-law of John Yount.

In *Richards v. Elwell*, 12 Wright., 361, a case of parol bargain and sale of land and possession for forty years, the court used the following language: "There is a time when

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the rule of evidence must be relaxed; and if not to be relaxed after forty years, when is it to be?"

Mr. WHARTON, in his work on Evidence, § 1354, after treating on the subject that when a record is complete the burden of proof is on the party by whom it is assailed, proceeds to say: "We have now to advance a step further, and to consider those titles in which after a long possession it is discovered in making up the title that one of its record-links cannot be found. Is it not likely that such link once existed but it is now lost? The answer to this question depends upon the degree of care with which records at the time under consideration were kept, and the casualties to which they were exposed; and in determining the question of the evidence of such link, and its subsequent loss, a very important point for consideration is the long acquiescence of adverse parties—an acquiescence not probable if the title was bad. Hence it is that the courts have assumed the existence and loss of such links after a lapse of time, varying with the conditions under which the records were placed."

The record here was a record of the court of pleas and quarter sessions, which court was abolished in 1868, and its records transferred to the superior court, where, as records of the past, it was not to be expected they would receive such care in their preservation as the records of the court in which the custodian was the clerk. And it is a well known fact of judicial history that the records of nearly all our courts suffered greatly from neglect during the war, and were besides exposed to the casualties and accidents of that disturbance.

Mr. WHARTON, in support of the principle laid down by him as above, cited numerous cases—notably among them are the cases of *Battles v. Holly*, 6 Greenleaf Rep., 145, and *Freeman v. Thayer*, 33 Maine, 76.

In the former case it was held that after the lapse of

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thirty years the authority and qualification of an administrator were presumed from the existence of an inventory, a schedule of claims filed by him on oath, a petition preferred by him to sell the real estate of the deceased, with the certificate of the judge thereon recognizing him as administrator, the probate records and files of that period appearing to have been loosely kept, and no other vestige of his appointment having been discovered. And in the latter case, HOWARD, J., speaking for the court, said: "It has been determined that after the lapse of thirty years from a collector's sale of land for taxes, it may be presumed from facts and circumstances proved, that the tax bills, valuation, warrants, notices, &c., were regular; that the assessors and collectors were duly chosen at legal meetings; that the collector was sworn; that a valuation and copy of the assessment were returned by the assessors to the town clerk, and that *every thing which can be thus reasonably and fairly presumed, may have the force and effect of proof,*" and for the position he cited a number of English and American decisions.

Upon consideration of the authorities cited bearing upon the facts of this case, we are led to the conclusion that there was no error and the judgment of the superior court is therefore affirmed.

No error.

Affirmed.

B. W. PARKER and others v. A. T. GRANT and others.

Bankruptcy—Executors and Administrators—Statute of Limitations—Commissions.

1. A debt provable under the bankrupt act (if not a fiduciary debt) is extinguished by the discharge in bankruptcy.

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2. While an administrator may or may not plead the statute in bar of the recovery of a debt due by his intestate, or retain a debt due himself, though barred, for in such case the obligation continues and the remedy only is suspended, yet he cannot waive the fact of the intestate's discharge in bankruptcy, for in that case the debt is extinguished.
3. An administrator cannot make an extra charge for personal attention to the affairs of the estate. Commissions are allowed for this service.

(*Withers v. Stinson*, 79 N. C., 341; *Blum v. Ellis*, 73 N. C., 293; *Knabe v. Hayes*, 71 N. C., 109; *Schaw v. Schaw*, Tay., 125; *Morris v. Morris*, 1 Jones Eq., 326, cited and approved.)

CIVIL ACTION, tried upon exceptions to a referee's report at Spring Term, 1884, of DAVIE Superior Court, before *Gilmer, J.*

The action was brought by the plaintiffs as next of kin of John R. Parker, deceased, against the defendants A. T. Grant and Rebecca Grant (formerly Parker) and others, sureties upon their bond as administrator and administratrix of said deceased.

The next of kin were B. W. Parker, E. N. Parker, L. F. Parker and the defendant Rebecca. Each was entitled to one-fourth of the estate. B. W. Parker was entitled however to two shares—one in his own right, and the other by purchase of the share of E. N. Parker.

L. F. Parker died, and A. M. Parker is entitled to his share as his administratrix.

The defendants James A. Kelly and James B. Lanier are the sureties on the administration bond of the defendants A. T. and Rebecca Grant.

Pleadings in the case were regularly filed, and at fall term, 1881, the case was referred to G. M. Bingham to take and state an account of the administration of the estate of said intestate, John R. Parker, and a report was made to fall term, 1883.

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The defendants offered in evidence before the referee, and claimed the right to be allowed to retain the following debts due to them by their intestate:

1. A judgment rendered in Rowan county court in favor of T. J. Meroney, plaintiff, against John R. Parker, defendant, at May term, 1868, (on the 4th of May, 1868,) for the sum of \$1,020.15, and costs, of which judgment the defendant Rebecca claimed to be the owner, but the plaintiffs denied she was the owner. Testimony was offered on that question by both parties.

2. The defendants also claimed to be allowed as a retainer an account due by their intestate to Rebecca, prior to the first day of May, 1868.

The plaintiffs objected to the allowance of these retainers upon the ground that the intestate owed nothing to either of the defendants, and for the further reason that the intestate in his life-time had been duly discharged as an adjudicated bankrupt from all his debts, including the aforesaid alleged debts to the defendants. In support of this defence, the plaintiffs offered in evidence the original discharge in bankruptcy granted to John R. Parker by the district court of the United States for the Cape Fear district of North Carolina, bearing date the 9th of July, 1870, by which it appeared that it was ordered by the court that John R. Parker be forever discharged from all debts and claims, which by said act of bankruptcy are made provable against his estate, and which existed on the 30th of May, 1868, on which day the petition for adjudication was filed by him.

The referee ruled that the discharge in bankruptcy operated a discharge of said judgment and account, which existed prior to the 30th of May, 1868, and refused to allow the defendants credit as retainers for the amount of the same. To this ruling the defendants filed the following exceptions:

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1. For that the referee refused to allow defendants, in accounting with the intestate's estate, the said judgment, and which the referee finds belonged to the defendants at the rendition thereof.

2. For that the referee refused to allow the defendants the value of the various articles of personal property claimed by defendant Rebecca to have been retained by John R. Parker, at the time Rebecca married and left his house.

The defendant Rebecca also claimed to be allowed as a retainer the sum of thirty dollars for her services, while acting as administratrix in taking care of the property of her intestate for three months. The referee allowed this credit and the plaintiffs excepted.

His Honor, upon the argument before him, overruled both of the defendants' exceptions, and sustained the exception of the plaintiffs. Judgment was accordingly rendered in favor of the plaintiffs and the defendants appealed.

Messrs. Clement & Gaither, for plaintiffs.

Mr. J. A. Williamson, for defendants.

ASHE, J. The only question presented for our consideration by the record, is, whether there was any error in the ruling of the court below in disallowing the exceptions taken by the defendants, and sustaining that taken by the plaintiffs.

The first exception is, that the referee refused to allow the defendants to retain the amount of a judgment rendered in the court of pleas and quarter sessions of Rowan county, in 1868, in favor of T. J. Meroney against John R. Parker for \$1020.15, which was proved to belong to the defendant Rebecca.

On the trial before the referee, the plaintiffs offered in evidence the proceedings in bankruptcy in the district

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court of the United States, bearing date the 9th of July, 1870, by which it was ordered by said court that the said John R. Parker be forever discharged from all debts and claims, which by the act of bankruptcy are made provable against his estate, and which existed on the 30th day of May, 1868.

This judgment was a debt provable under the bankrupt act. It was not a fiduciary debt; nor does it fall within the class of any other non-provable debts. And if provable, it was a final discharge of Parker from the judgment. *Withers v. Stinson*, 79 N. C., 341; *Blum v. Ellis*, 73 N. C. 293; *Knabe v. Hayes*, 71 N. C., 109.

The defendants' counsel, however, contended that pleading bankruptcy was analogous to pleading the statute of limitations, and as no one can plead the statute of limitations to a debt due by his intestate but the administrator, so no other person could set up a defence of a discharge in bankruptcy from a debt due by him. But the analogy does not hold good. It is true, the administrator only can plead the statute in bar of a debt due by his intestate (except the heir when he is sued or another creditor in a creditor's bill), and he may retain for a debt due to himself though barred by the statute of limitations. *Williams on Executors*, 693. And the reason is the obligation continues, and it is only the remedy which is suspended by the statute, and the administrator may, if he chooses, when sued by a creditor waive the right of relying upon the statute, and pay the debt. And if he may pay the debt to another when he might have pleaded the statute, the same author asks, "why may he not pay himself?"

But a debt discharged in bankruptcy has no longer any legal existence. It is extinguished by the discharge; and the only instance in which it has been recognized as having any vitality, is, when after the discharge it is held to be a sufficient moral consideration to support a promise to pay it.

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But here there was no promise made by Parker to pay this judgment after his discharge in bankruptcy.

When on the trial before the referee the defendants offered the Meroney judgment in evidence to support a retainer for that amount, it was competent for the plaintiffs to show by any legitimate evidence that the debt was not due, and this they did by showing that the defendants' intestate had been discharged in bankruptcy.

The defendants, as the representatives of John R. Parker, held his assets in trust for themselves and the other next of kin of the intestate, and had no right to waive the fact of his discharge, so as to rehabilitate the defunct judgment and set it up in support of a retainer against the rightful claims of the other next of kin.

The reasons here given for maintaining the ruling of His Honor upon the first exception of the defendants, apply with equal force to his ruling upon their second exception, which was founded upon his disallowance of the defendants' account against their intestate. For we are of the opinion that it, like the judgment, was extinguished by the discharge in bankruptcy; for "all demands against the bankrupt for or on account of any goods or chattels wrongfully taken or withheld by him, may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest." *Bump on Bankruptcy*, 492.

As to the exception taken by the plaintiffs, which was sustained by the court, there is no error. Commissions are allowed to administrators and executors for the personal attention which they devote to the estate, and they are not allowed to make an extra charge for it. *Schaw v. Schaw*, Tay. 125 (76); *Morris v. Morris*, 1 Jones Eq., 326.

There is no error. The judgment of the superior court is affirmed.

No error.

Affirmed.

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*ALANSON CAPEHART v. LOUIS F. DETTRICK.

*Mortgage—Foreclosure Proceedings—Statute of Limitations—
Proceedings in rem and in personam.*

1. Where a deed of trust, made to secure a series of notes due at different times, provides that in default of payment of the same or any part thereof at maturity, then the whole shall become due and payable; *Held*, the only effect of the provision is to allow foreclosure upon a default, the proceeds to be applied to all the notes at once, and not to start the running of the statute of limitations, against the notes not due, from the time of such default.
 2. The limitations prescribed for personal actions do not apply to the remedy afforded in a court of equity by a foreclosure; hence where a debt, which is barred by the statute, is secured by a mortgage or any collateral security which is not barred, the mortgagee may enforce the remedy by foreclosure proceedings, or his lien upon the collaterals.
 3. The statute of limitations defeats the remedy but does not discharge the debt.
 4. In this state, a mortgage is not considered as merely subsidiary to the debt, but is a direct appropriation of property to its payment, and may be enforced by a direct proceeding to subject the property in satisfaction thereof, without reference to the personal remedy which is given by the note.
- (*Murphy v. McNeill*, 82 N. C., 221; *Lewis v. McDowell*, 88 N. C., 263, cited, commented on and approved.)

CIVIL ACTION, tried on exceptions to a referee's report, at Fall Term, 1882, of NORTHAMPTON Superior Court, before *McKoy, J.*

This action, originally commenced by Alanson Capeheart against Asa Biggs and Kader Biggs, constituting the partnership firm of Kader Biggs & Co., was for an injunction to restrain them from making sale under a deed in trust to

*Mr. Justice MERRIMON having been of counsel did not sit on the hearing of this case.

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secure his indebtedness to them, and meanwhile for the statement of an account in order that the amount due be ascertained. The controversy between these parties has been adjusted, and Louis F. Dettrick was allowed to intervene and assert his claims as a creditor of the said Alanson Capeheart, and his right to enforce the payment of certain notes executed by James Capehart to his father, the said Alanson Capehart, secured in a deed in trust made by the former to the latter, which said notes were held as collateral security for the indebtedness of said Alanson Capehart.

The subject matter of this superseding and new controversy introduced by said Dettrick was referred to Spier Whitaker, who in due time made his report, and therein from the evidence accompanying, finds the following facts:

On February 11th, 1876, the said Dettrick held and owned five several notes, not under seal, executed by said Alanson Capehart to the Bradley Fertilizer Company, and by it transferred, of dates and amounts and maturing as follows:

One, dated on June 30th, 1875, at 5 months, for \$600.

A second, of same date at 6 months, for \$600.

A third, dated on July 10th, 1875, at 5 months, for \$600.

A fourth, dated on July 20th, 1875, at 4 months, for \$705.60.

A fifth, of same date, at 5 months, for \$600.

On the same day this indebtedness subsisting, subject only to a credit of \$760.18 paid on the 16th day of December, 1875, the said Alanson Capehart, to secure the same, assigned and delivered to said Dettrick fourteen promissory notes made by the said James Capehart to the assignor, Alanson Capehart, of dates maturing, and in amounts as follows:

One, dated January 1st, 1876, due at one year, for \$7,500.

Six, of the same date, due respectively at 2, 3, 4, 5, 6 and 7 years, each in the sum of \$5,850.

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Seven, of the same date, due respectively at 8, 9, 10, 11, 12, 13 and 14 years, each in the sum of \$5,300.

Subsequently the said Alanson Capehart became further indebted to the said Dettrick by account for the sum of \$375.99, with interest thereon from the 26th day of January, 1877.

To provide for and secure the aforesaid fourteen notes, on the day of their execution, the said James Capehart, by deed, conveyed to the said Alanson Capehart a valuable tract of land lying in Northampton county, upon trust that if the notes, as each becomes due, shall be paid off and discharged, the deed shall become inoperative and void; but should there be default in the payment of the said debt or any part as either may become due, "then the whole shall become due and payable, and this deed shall remain in force, and the said party of the second part, or in case of his absence, death or refusal or disability in any wise, then the acting sheriff of Northampton county, at the request of the legal holder of the said notes, may proceed to sell the property, herein before described, or any part thereof, at public vendue to the highest bidder at the court house door in the town of Jackson," &c.; "and such trustee shall, out of the proceeds of said sale pay first the cost and expenses of executing this trust, including legal compensation to the trustee for his services, and next shall apply the proceeds remaining over to the payment of said debt or so much thereof as remains unpaid, and the remainder, if any, shall be paid to the said party of the first part, or his legal representative."

The referee finds that the said Alanson Capehart has not promised to pay his indebtedness to said Dettrick at any time within three years next before the bringing this suit. and that the fourteen secured notes are due and unpaid.

From these facts the referee deduces and finds as conclusions of law—

1. That the recovery of the indebtedness of the said Alan-

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son Capehart to the said Louis F. Dettrick is barred by the statute of limitations ;

2. That said Alanson Capehart is entitled to the possession of the fourteen notes described and secured in the deed ; and

3. That the said Louis F. Dettrick take nothing by his suit, and that said Alanson Capehart recover his costs against him and the surety to his prosecution undertaking.

The said Louis F. Dettrick excepts to these findings of law, and his exceptions being overruled and the report confirmed, and judgment rendered accordingly, he appeals to this court.

Messrs. R. B. Peebles and Hinsdale & Devereux for plaintiff.

Messrs. W. Bagley, Mullen & Moore, T. C. Fuller and E. C. Smith, for defendant.

SMITH, C. J., after stating the above. There are two material propositions of law involved in the rulings made by the referee and affirmed by the court, which the appeal requires us to examine and decide.

1. The series of notes mentioned in the deed, though upon their face many of them maturing in the future, have had the time of payment accelerated by a provision therein, and are now due and belong to said Alanson Capehart.

2. The effect of the lapse of time in barring a recovery on his indebtedness to the said Dettrick exonerates the collateral securities assigned to the latter from the lien of the indebtedness so barred, and entitles the debtor to their surrender.

The provision in the deed to which is ascribed an effect in hastening the maturity of the notes is, that if the debtor Alanson Capehart fail or refuse to pay the said debt or any part thereof, when the same or any part thereof shall become due and payable, according to the true tenor, date and

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effect of said notes, then the whole shall become due and payable, and this deed shall remain in force."

This clause, thus interpreted, is in direct conflict with the form of the notes themselves, while they and the securing deed were executed at one and the same time. Can it be supposed the parties intended thus to introduce a secret clause into negotiable instruments, upon their face not appearing, by which they were to become due and the statute put in motion, so as to defeat a recovery, before, upon their expressed terms, the money could be demanded?

Could an endorsee suing before maturity sustain his action by showing that one of the series had become due and was not paid, and the deed which is supposed to effect the assumed change upon the happening of such a contingency?

We are clearly of opinion that this is not the intent of the parties, nor the legal operation of the deed. The force of this provision is spent in allowing a foreclosure of the mortgage and a sale of the property upon any default of the debtor in meeting his several obligations, and, when sold, in at once appropriating the proceeds to the payment of all the notes, instead of successive fragmentary sales, and instead of leaving the funds received in excess of the over-due notes, to await an application at a distant day, when others become also severally payable.

It is only for the prompt enforcement of the right to sell, conferred upon the mortgagee, that the notes are declared to "become due and payable" when the debtor fails to pay any of them when he promises to do so; and then it is that the "deed shall remain in force" and the mortgagee may exercise his right of sale.

This construction of the deed and of its operation upon the secured debts is sustained by the opinion and ruling of the supreme court of the United States in *Howell v. Western R. R. Co*, 94 U. S. Rep., 463. There, the bond which was

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issued under a statute that required it "not to mature at an earlier period than thirty years," was so drawn that the whole amount became payable upon a continued default in payment of interest for six months, and a similar provision accelerating payment was contained in the mortgage given for its security.

The clause in the bond which contravened the statute was declared to be a nullity, and, thus divested of the objectionable feature, was held to be operative, the court saying that "the company had a right to mortgage their property for the payment of these instalments of interest, as well as principal, and to make it one of the provisions of the mortgage that it might be foreclosed if these instalments were not paid as they fell due."

This could not have been, if the effect of the mortgage was to insert in the bond a provision which, but for its nullity, would have been a fatal defect in it as an obligation.

There is reason for this in the fact that unless the appropriation can be made of the proceeds of sale to the unmatured notes, the excess above the sum required in payment of such as had become due, would be idle in the hands of the mortgagee to await the maturity of the others, to the great loss of the debtor, as he was entitled to no portion of the fund until all the notes were paid. We are therefore clearly of opinion that the obligation of the notes, as such, remains unaffected by the deed, and it only confers power upon the mortgagee to sell upon any default, at his election, and, where he does sell, to pay all the secured notes as well such as were, as such as were not then due.

The next inquiry to be made is as to the effect of the running of the statute against the debt due to Dettrick, upon the collaterals which had been, contemporaneously with the making of the notes to him on February 11th, 1876, conveyed by deed accompanied with delivery, and upon the lien thus acquired. The assignment made in

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Baltimore has been duly proved and registered in Northampton county, and includes not only the notes but also the mortgage security given by said James Capehart.

Can the collaterals thus held by Dettrick be retained by him after, from delay, he is precluded from enforcing the indebtedness to himself by action against Capehart, or is his lien on the collaterals lost and he bound to surrender them to his debtor?

It is to be observed that the deed of assignment recognizes and admits the indebtedness of the said Alanson Capehart to Dettrick as a subsisting fact, while not distinguishing its constituent parts or the aggregate specific amounts, although at the same time the five notes were executed.

Without inquiring whether this recognition in an instrument under seal of the existence of the indebtedness has the effect of lifting it to a higher plane, not reached by the statute which limits to a narrower period the action founded on a parol contract, and assuming that the action upon the notes could not surmount the barrier interposed to their recovery, the inquiry meets us—whether this will deprive the creditor of the means of making his debt out of the securities in his hands, which are not thus barred, and can be enforced against the maker under the deed of trust.

It is plain, if an action at law were instituted upon the over-due notes assigned, as the running of the statute begins as to each as it falls due, but few would be defeated by the defence under it; but however this may be as to such, when attempted to be enforced as personal obligations, it by no means follows that payment may not be coerced as to them and all others out of the appropriated property conveyed in the mortgage. The authorities are full and ample that the limitations prescribed for personal actions do not apply to the remedy afforded in a court of equity by a foreclosure sale and application of the proceeds to the notes.

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There is a clear distinction between the loss of a particular remedy at law and the extinguishment of the debt.

"I am clearly of opinion," remarks LORD ELDON in *Spears v. Hartley*, 3 Esp. 31, "that though the statute of limitations has run against a demand, if the creditor obtains possession of goods on which he has a lien for a general balance, he may hold them for that demand *by virtue of his lien.*"

"The creditor receiving a mortgage of real estate as collateral security for the payment of a negotiable promissory note," declares a recent author, "has a double remedy to recover his debt—a suit in equity to subject the land to its payment, and an action at law upon the note, and a recovery may be had on the one, although there may be some technical objection or difficulty as to a recovery upon the other. The statute of limitations affecting only the remedy on the note, the debt itself, which the mortgage is given to secure, remains unsatisfied, and an enforcement of the security to secure the payment of such debt is permitted upon equitable rules. *Colebrooke on Col. Securities*, § 156, citing numerous cases to support the proposition, which are found in note 1.

Says the same author in section 101, "the statute of limitations defeating simply the remedies upon a debt does not operate in law as a discharge of the debt itself, which remains; so that where negotiable instruments have been deposited as collateral security for the payment of a loan or debt, the pledgee is entitled to retain possession of the same as against the pledger, *notwithstanding the statute of limitations might be pleaded to an action on the original note.*

The doctrine is thus declared in an opinion by the Chief Justice in *Belknap v. Gleason*, 11 Con., 160; *Ivey v. Adams*, 26 Maine, 330; *Grant v. Burr*, 54 Cal., 208; *Ipswich Manufacturing Company v. Story*, 5 Metc., 310; *Fisher v. Mossman*,

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11 Ohio, 42; *Richmond v. Aiken*, 25 Vt., 324, and in many others.

The opinion of Chief Justice WILLIAMS in the case first cited is so full, explicit and conclusive in its reasoning that we reproduce a portion of what he says: "That no action at law will lie upon these notes, if the statute of limitations is pleaded, cannot be doubted." Then after a reference to cases in which it is declared that equity will not aid claims barred at law, he proceeds: "But these cases do not prove, nor does the principle require that when a creditor holds different instruments to secure the same debt, if the remedy upon one is barred at law, the remedy upon all is barred in equity. * * What analogy requires a court of equity to say that the remedy at law is gone, and there is none in chancery? One remedy is indeed gone, and only one. * * * The statute of limitations are statutes of repose. They suspend the remedy but do not cancel the debt."

So remarks Chief Justice SHAW in the case reported in Metcalf: "A mortgage is a security for the payment of money for which the creditor has a personal obligation in common form and also a pledge of real estate, and he may pursue either of these remedies—both being securities for one and the same debt—until the debt is paid; and although one may be lost or barred, it does not destroy his right to pursue the other."

"The creditor may abandon the personal obligation of the debtor," is the language of REDFIELD, C. J., in *Richmond v. Aiken*, "without affecting his security upon the land, that is, he does not lose his right to pursue the land by allowing the security to become barred by the statute of limitations."

There are a few states where the contrary doctrine prevails, as mentioned by Mr. Colebrooke in section 157, the mortgage being regarded as merely subsidiary to the debt,

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an incident to the principal, the shadow which follows and depends upon the substance.

This is not the view taken in this state of these relations, nor is it in harmony with the general course of the adjudications elsewhere. The note evidencing the debt is the personal obligation of the debtor—his undertaking; the mortgage is a direct appropriation of property to its security and payment. The first is enforced in a personal action; the other in a proceeding to subject the property thus appropriated to the satisfaction of the debt. These remedies against the person and property specifically assigned are entirely different; and, while subsisting and concurrent, either may be resorted to. The loss of one does not of itself cut off a resort to the other.

The opposite doctrine had been announced in New York, of which case Chancellor WALWORTH, thus speaks in *Heyer v. Pryer*, 7 Paige, 465: "What was said by SUTHERLAND, J., in *Jackson v. Socket*, 7 Wend., 94, that a mortgage to secure a simple contract debt was presumed to be paid in six years, because the statute of limitations might at the expiration of that time be pleaded to a writ on the note, *cannot be law*.

In *Murphy v. McNeill*, 82 N. C., 221, the suit was for the foreclosure and sale of property conveyed in a mortgage to secure a note within the exclusive jurisdiction of a justice of the peace, and it was objected that the action was not originally cognizable in the superior court, because the debt was less than \$200. In answer to this suggestion the court say: "The action is not founded on the contract merely, but on an equity growing out of the relation of mortgagor and mortgagee, to have the mortgaged premises, in case of default, sold for the satisfaction of the debt"—thus distinguishing between the two remedies, legal and equitable, open to the creditor.

The principle is recognized in our own present statute,

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limiting the times within which actions may be brought on different obligations. The period prescribed for actions on contracts, not under seal, against the principal debtor is three years (THE CODE, §155), while an action for the foreclosure of a mortgage of real estate may be brought within ten years, after forfeiture, or after the last payment, or after the power of sale becomes absolute, §152.

It is proper in this connection to notice a remark made in the opinion in *Lewis v. McDowell*, 88 N. C., 261: "It is true if the debt, separately existing, has been discharged, or is not recoverable from lapse of time, the relief could not be obtained, since the purpose of the mortgage or retained title is only a security for it." The "lapse of time" has reference to an unrepelled presumption of payment, though the general words are sufficiently comprehensive to take in a debt not paid, but to an action for the recovery of which the statute is a bar. Thus understood and restricted, the ruling is in harmony with the present opinion and the prevailing current of judicial authority.

There is error, therefore, and so it must be declared, in the conclusions of law announced in the report and affirmed by the judge, that,

1. All the notes of James Capehart are now due, this being true only as to such as have matured;
2. These notes belong to Alanson Capehart and he is entitled to have them restored by the said Dettrick, in whose hands they are;
3. That the said Alanson Capehart go without day and recover his costs of said Dettrick and his surety to the prosecution bond.

The exceptions of the appellant to the said rulings are sustained, and the cause will be remanded for further proceedings in the court below in conformity to the law as declared in this opinion.

Error.

Reversed.

EDWARDS v. PHILLIPS.

O. B. D. EDWARDS v. G. L. PHILLIPS and others.

Ejectment—Landlord and Tenant—Motion—New Action.

In ejectment, the summons issued against the defendant, who was a lessee and the only person in possession of the land; *Held*, after judgment for plaintiff and ejection of defendant, a party alleging himself to be the landlord of the defendant cannot, by motion, be let in and allowed a writ of restitution. Such party can assert his right to the possession by bringing a new suit against the plaintiff.

(*Smith v. Newbern*, 73 N. C., 303; *Stradley v. King*, 84 N. C., 635; *Thomas v. Orrell*, 5 Ired., 569; *Judge v. Houston*, 12 Ired., 108; *Wilson v. Hall*, 13 Ired., 489, cited and approved.)

MOTION heard at Spring Term, 1884, of MITCHELL Superior Court, before *Shipp, J.*

The defendant G. L. Phillips made this motion, upon affidavits, to be allowed to come in and defend the action as landlord, and for a writ of restitution, placing his ejected tenant into possession of the premises in dispute until the final hearing. The motion was refused and the defendant appealed.

No counsel for plaintiff.

Messrs. Batchelor & Devereux, Gudger and Marsh & Greene, for defendant.

SMITH, C. J. The plaintiff having obtained leave from the judge of the district to sue as a poor person, on the 6th day of November, 1882, instituted his action against the defendant, Claiborn Johnson, to recover possession of a tract of land described in his complaint, whereof he alleges himself to be the owner in fee, and the defendant in the

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wrongful and unlawful occupancy with withholding it from him.

The summons issuing in the cause was served on the defendant and returned to the next term of the superior court. At the same term held in the spring of 1883, the plaintiff filed his complaint and the defendant failing to appear and answer the same, the following judgment was rendered :

“ This cause coming on to be heard and it appearing to the satisfaction of the court that no answer has been filed to the complaint of the plaintiff, on motion of J. L. McElroy and J. W. Bowman, attorneys, it is adjudged that the plaintiff recover the lands described in his complaint of the defendant, Claiborn Johnson, and that the clerk of the said superior court of Mitchell county issue to the sheriff of said county, a writ commanding him to remove the said Claiborn Johnson from the said lands above named, and that the said sheriff put in possession of the said land the plaintiff, and that the defendant pay the cost of this action to be taxed by the clerk.” (Signed by GUDGER, J.)

In June following G. L. Phillips the appellant caused a notice to be served on the plaintiff of an intended motion to be made, before the judge who tried the cause, at chambers, for an order of restitution of the land to his tenant Emory Bennett and to strike out the judgment and admit himself to come in and defend the action. In support of his motion he read his own affidavit upon the hearing and therein states in substance :

That he resides in Tennessee and believes he has title in fee to the premises derived under a deed from one Birchfield made in 1876 ; that the plaintiff theretofore brought suit for the land against Birchfield and a tenant of his in possession and failed to recover ; that the plaintiff again sued affiant's other tenant and the action was dismissed at his costs ; that affiant's agent had leased the land to the defendant John-

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son for the year 1882, and to Emory Bennett for the succeeding year who had entered upon his term and was ejected under the writ of possession issued on the judgment, of the proceeding in which affiant had not, nor did his said agent have any notice before; that he is informed that the plaintiff had been on the premises and summoned him as a witness on his (the witness') own behalf to appear at the next term of the court, misleading him as to the nature and purposes of the process served and causing him to make default; that the plaintiff is utterly insolvent and bills of cost against him incurred in previous suits remain unpaid and cannot be collected, and that affiant has expended large sums of money in making improvements upon the land.

The record proper does not so state, but the case on appeal sent up does, that a restraining order as to rents was granted and the further hearing of the motions was by consent postponed to the next regular term of Mitchell superior court and then the cause not being reached, it was continued and decided against the applicant who appeals.

The motions were denied upon two grounds:

1. For that the said Phillips was not a party to the record and could not be heard to make the motions.

2. For that the judgment being granted by the judge, it must be presumed to have been done with knowledge of the facts and could not be disturbed.

We are unable to find any just cause of complaint in the ruling of the court, or indeed any authority to warrant the present proceeding.

The defendant was in possession of the land when the action was brought and against him only could it be prosecuted and he seeks no relief from the judgment. No other person can complain, as he alone is affected by it. This is expressly held when the application is made under section

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133 of C. C. P., (THE CODE, § 274,) in the case of *Smith v. Newbern*, 73 N. C., 303.

The remedy is equally restricted when the action is to impeach directly a judgment already rendered, and is confined to such as are parties aggrieved by it.

The case cited and relied on, *Stradley v. King*, 84 N. C., 635, does not furnish any precedent for the course here pursued. It was an application, possessing all the substantial elements of a new impeaching action and we held might be so considered in answer to the objection that it was a motion in a determined cause and could not be entertained. But it was instituted by aggrieved parties in the action against the plaintiff and could be entertained, if not as a motion, as a new and original suit to impeach the judgment.

Reference was made to two other cases to show that the court would, under some circumstances, control the writ of possession when its issue and enforcement would work injustice to others in possession, who were not parties.

In *Thomas v. Orrell*, 5 Ired., 569, one of two persons in possession whose interest had been sold under execution and bought by the lessor was not allowed to resist a recovery against himself by showing title in another, Ruffin, C. J., declaring that every plaintiff in ejectment takes possession at his own risk and must take care not to take more than he is entitled to, nor to turn out persons who have the title on which there has been no judicial decision. The lessor of the plaintiff can of course have the defendant put out of the premises, but he will enter himself at the hazard of being a trespasser on the sons, provided they really are entitled to the land.

So after judgment, says PEARSON, J., if the sisters of the defendant can satisfy the court by proper affidavit that they have a *bona fide* claim to a life estate in the land and are in possession, the court has power to order the writ of possee-

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sion not to be issued until the plaintiff brings an action of ejectment against them. *Judge v. Houston*, 12 Ired., 108.

Again, in the case of *Wilson v. Hall*, 13 Ired., 489, where the lessor had eight children, of whom two claiming the land conveyed to the defendants and died intestate whereby the land descended to his heirs at law, it was ruled that after judgment the writ should be so moulded as to put the other six children in possession with the defendants but not to put them out.

These cases do not support the present application. The defendant was the only person in possession, when the summons issued, as lessee for the current year according to the affidavit, and no other could be sued.

The appellant has his remedy to regain possession by a new suit against the plaintiff if the allegations he makes are true, and the plaintiff would not be allowed to defend without securing the accruing rent, unless allowed to do so as a poor person, and, in a proper case, a receiver might be appointed. The law gives no sanction to his present motion, and the adverse judgment of the court in response thereto is not erroneous.

No error.

Affirmed.

JANE E. YOUNG v. JAMES R. YOUNG and others.

Guardian and Ward—Jurisdiction over infant defendants.

1. Jurisdiction cannot be acquired over infant defendants except by service of process upon them.
2. The court has no authority to appoint a guardian *ad litem* for infant defendants. This matter is now regulated by a rule of court (89 N. C., 612,) requiring such appointment to be based upon

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a motion made in writing, and then only after due inquiry as to the fitness of the person to be appointed; and such guardian must file an answer in every case.

(*Allen v. Shields*, 72 N. C., 504; *Moore v. Gidney*, 75 N. C., 34, cited and approved.)

CIVIL ACTION tried at Spring Term, 1884, of GRANVILLE Superior Court, before *McKoy, J.*

On October 30th, 1866, Russell H. Kingsbury and wife by deed for the recited consideration of twenty-five hundred dollars, paid by Peter W. Young, conveyed to the latter in fee a certain lot of land in the town of Oxford, to be held upon the following uses and trusts as therein declared, to-wit:

For the sole, separate and exclusive use and benefit of Jane Eliza Young, wife of said Peter W. Young, for and during the term of her life, and at her death for the use of her children then living and the then living issue of such of the children as shall have died leaving issue, as sharers in fee simple *per stirpes*. And it is further agreed between the said Russell H. Kingsbury, trustee, &c., (he acting in that capacity in the execution of his deed) and the said Peter W. Young, that at any time that it may seem to him to be to the interest of the said *cestuis que trust* he may sell the said land and premises absolutely, provided that without delay he shall re-invest the proceeds of such sale in real estate or personal estate at his discretion, or otherwise manage, apply and dispose of the said proceeds for the benefit of the said *cestuis que trust*, for the sole and separate benefit of the said Jane Eliza Young and her children in the same manner as the lands and premises in the deed are conveyed and settled.

The trustee, Peter W. Young, has since died, not having exercised the power conferred in said deed, and the plaintiff, his surviving wife, brings this action against the defendants, three of whom are her children, and seven grand-

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children, issue of marriages of a son and daughter, the wife and husband of whom are also parties to the suit, for the purpose of having a new trustee appointed, to be clothed with the same discretionary power as his predecessor, and in order that by him or by a decree of the court the land may be sold and a good title assured to the purchasers.

The complaint states that the daughter Harriet A., is an infant, and has a regular guardian, while the seven grandchildren are all under age and have no guardian.

The complaint was filed without the previous issue of a summons, at spring term, 1884, of the superior court of Granville, where the following order was entered :

"On motion in this cause it is ordered that the defendant James R. Young be appointed guardian *ad litem* for and on behalf of the defendants Peter W. Young, Charlotte A. Young, Jane E. Young and Mary B. Young, infant children of said James R. Young."

"And that the defendant Nathaniel B. Cannady be appointed guardian *ad litem* for and on behalf of the infant defendants Jane C. Cannady, Annie Y. Cannady and Florence G. Cannady, infant children of the defendant Mary C. Cannady, to defend this action on behalf of said infants respectively.

At the same term answers were put in by the adult defendants, and on behalf of their infant children by their respective guardians *ad litem* admitting all the allegations made in the complaint, while none seems to have been filed by the regular guardian of the defendant Harriet A. Young.

Upon this state and condition of the case and at the same term, a final decree was rendered declaring that the power created in the deceased trustee was personal, and by his death became extinct, and that the court possessed no authority to order the sale, as the contingent limitations could only take effect and the persons entitled in remain-

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der be ascertained at the death of the plaintiff, and reference was made to ascertain and report some fit person to be substituted as trustee. From this decree the plaintiff appeals.

Mr. M. V. Lanier, for plaintiff.

No counsel for defendants.

SMITH, C. J., after stating the case. We should not feel much hesitancy in giving our construction of the trusts contained in the deed, but forbear to do so because the case is not properly constituted in court, and the matter is not before us.

No jurisdiction can be acquired over infant defendants except by the service of process upon them, and no authority resides in the court to appoint a guardian *ad litem*. This was strongly intimated in the opinion of the court delivered by RODMAN, J., in *Allen v. Shields*, 72 N. C., 504, and declared in positive and emphatic terms by BYNUM, J., in *Moore v. Gidney*, 75 N. C., 34.

His language is this: "Where infant defendants, in a civil action or special proceeding, have no general or testamentary guardian, *before a guardian ad litem can be appointed*, a summons must be served upon such infant, and a copy of the complaint, with the summons, must be served or filed according to law."

To secure protection to infant defendants in suits, this court adopted a rule, when the rules were last revised, that "all motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case." Rule of Practice in Superior Courts, 89 N. C., 612.

These requirements have been entirely disregarded in the present case, and precipitate action had in the superior

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court, which we cannot recognize and uphold, without a surrender of all the safeguards which the law throws around an infant for the protection of his interests.

The cause must be remanded to the superior court of Granville county, and it is so ordered.

Remanded.

 BARCROFT & CO. v. ROBERTS & CO.

Reference—Statute of Limitations.

1. In a reference under THE CODE, the referee reports the evidence and his findings of fact therefrom and his conclusions of law.
 2. Upon exceptions filed, the judge reviews the findings of fact and law—the findings of fact by the judge being conclusive, and his conclusions of law reviewable on appeal; but if the judge does not find the facts, it is presumed he accepts those found by the referee.
 2. A party will not be allowed to set up the statute in bar of a debt, where it appears the delay in suing was caused by the promise of himself or attorney that the matter would be settled and no advantage taken of the lapse of time.
- (*Green v. Castlebury*, 70 N. C., 20; *Haymore v. Com'rs*, 85 N. C., 268, and cases there cited, approved.)

CIVIL ACTION, tried upon exceptions to a referee's report, at Fall Term, 1884, of BUNCOMBE Superior Court, before *Graves, J.*

The action was brought on the 21st of October, 1878, to recover the sum of \$390.95 due on account for goods sold by the plaintiffs to the defendants on the 17th of January, 1870, payable in sixty days from the date of the purchase,

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and at fall term, 1878, the defendants in their answer alleged payment in full.

At spring term, 1880, the defendants by leave of court filed an amended answer, in which they set up that more than three years had elapsed since the cause of action accrued, and at spring term, 1883, by consent, it was ordered that all the issues involved in the case be referred to A. F. Summey, as referee, with directions to report to the next term. The report was accordingly filed, and is as follows:

Findings of fact—"G. M. Roberts & Co. and G. M. Roberts had dealings with Barcroft & Co., commencing in April, 1869.

G. M. Roberts & Co. purchased of the plaintiffs various bills of goods, &c., amounting in the aggregate to \$1,509.81, during that period, the first bill being sold 6th April, 1869, and the last bill 17th January, 1870.

The defendants have paid in various payments extending from 15th January, 1870, to August, 1875, \$1,266.13, leaving a balance due 26th August, 1875, of \$243.18.

The credit entered the 15th January, 1870, for \$238.37 was the net proceeds of the \$246 draft, the cost of collecting the same being \$7.63, and there was no draft paid for said amount of \$238.37.

The defendant, G. M. Roberts, has claimed from the first that he paid two drafts, one for \$240, and one for \$238.37.

W. M. Cocke, Jr., attorney for the plaintiffs, to whom this matter was originally entrusted for settlement, delayed bringing an action because of the repeated promises of the defendant, G. M. Roberts, to settle the matter and pay whatever balance might be due; and the further promise of G. M. Roberts or J. L. Henry, who was the attorney for the defendants, that they, the defendants, would not rely upon the statute of limitations.

The defendants have received credit for all the payments they have made.

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No judgment has heretofore been obtained or docketed against the defendants upon the amount declared for in the complaint, and the debt due the plaintiffs has not been satisfied as alleged by the defendants.

The amount sued for in the complaint, \$391.95, is erroneous, and in excess of the amount due as principal : but the sum of \$243.18 is the principal amount due.

The money receipted for as per receipt filed has been paid over to the plaintiffs, and cannot be set up against the claim declared for."

Conclusions of law—"The claim of the plaintiffs is not barred by the statute.

The defendants owe the plaintiffs the sum of \$243.18, with interest thereon from the 26th day of August, 1875, and the plaintiffs are entitled to judgment against the defendants for the sum of three hundred and sixty-three dollars and twelve cents, of which sum \$243.18 is principal, and \$119.94 is interest, calculated from the 26th day of August, 1875, to 19th November, 1883, and for costs of this action." (Signed by the referee.)

The defendants thereupon filed the following exceptions to the referee's report, which were heard at spring term, 1884:

1. That the referee erred in his finding of fact "that W. M. Cocke, Jr., attorney for the plaintiff, to whom the matter was originally entrusted for collection delayed bringing an action because of the repeated promises of the defendant, G. M. Roberts, to settle the matter and pay whatever balance might be due, and the further promise of G. M. Roberts or J. L. Henry, that they, the defendants, would not rely upon the statute of limitations," in that no promise of defendants, or either of them, or of their attorney, was shown to have been within three years next preceding the bringing of this action, nor were said promises, if any, in writing, nor were said promises, if made within three years, sufficient in law to repel the statute of limitations.

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2. That the referee erred in his finding of fact "that the defendants received credit for all the payments they have made," in that he does not allow the defendants credit for the sum of \$500 paid by the defendants to the plaintiffs' attorney September 28, 1872, as shown by the receipt of said attorney, offered in evidence before the referee, and now on file in the records in this cause.

3. That the referee erred in his finding of law "that the claim of the plaintiffs is not barred by the statute of limitations," when as a matter of fact appearing on the record in this cause, more than three years had elapsed, prior to the bringing of this action, and no promises, verbal or written, were shown to have been made within said three years.

The court below sustained the exceptions and rendered judgment for the defendants, and the plaintiffs appealed.

Messrs. Jones & Hardwicke, for plaintiffs.

No counsel for defendants.

ASHE, J. The reference to Summey was a reference under THE CODE, and it was the duty of the referee to report the evidence, his findings of fact and his conclusions of law. And it was then the duty of the judge, upon exceptions filed by the defendants in this case, to review the findings of the referee upon the facts and law. The judge should then find the facts himself upon the evidence, and his conclusions of law upon his findings. His findings of fact, upon appeal to this court, are conclusive; and his conclusions of law upon them are alone reviewable. *Green v. Castlebury*, 70 N. C., 20.

But where the judge does not make a special finding of the facts, it is presumed in such case that he accepts the findings of the referee.

In the evidence reported by the referee, we find an exhibit marked "A," which one of the plaintiffs testified was a true

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exhibit of all the credits to which the defendants were entitled. The exhibit is as follows:

" PHILADELPHIA, July 12th, 1883.

Messrs. G. M. ROBERTS & Co., Asheville, N. C.,

In account with BARCROFT & Co.:

[Remittances by Express must be prepaid.]

1869.

April 6th.	To merchandise 60 days.....	\$	370.52
Sept. 25th.	Interest		3.80

CR.

July 25th.	By cash	\$300.00
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Sept. 25th.	" "	74.32
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	\$374.32	\$	374.32
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1869.

May 14th.	To mdse 60 days, due July 14th, 1869,	\$	477.92
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Sept. 25th.	" " " " Nov. 25th, "		689.07
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1870.

Jan. 17th.	" " " " March 17th, 1870,		342.81
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	\$1,509.81
--	------------

1870.

CR.

Jan. 15th.	By cash.....	\$238.37
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"	expenses of collection..	7.63
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1871.

April 7th.	" cash	104.63
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May 12th.	" "	100.00
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June 13th.	" "	200.00
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1872.

Oct. 16th.	" "	200.00
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1873.

June 4th.	" " \$49.75, ex. 25c.....	50.00
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1875.

Oct. 15th	" " \$239.09, ex. \$26.91.....	266 00
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Aug. 26th,	" " \$89.90, ex. \$10.10.....	100.00
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	1,266.63
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Bal. due exclusive of interest.....	\$243.18
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To mdse due March 17, 1870, \$342.88

" interest to August 7, 1872, 41.13

Amount of claim sent W. M. Cocke, Jr., August 7, 1882,
for collection, \$391.95."

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But the defendants offered in evidence a receipt for five hundred dollars, dated the 28th of September, 1873, and that this voucher was not allowed as a credit to the defendants by the referee; and this constitutes their second ground of exception.

The referee has found the facts, that the defendants had dealings with the plaintiffs, beginning in 1869; that the bills of goods purchased by them from the plaintiffs, between that time and the institution of this action, amounted in the aggregate to \$1,509.81—the first bill having been sold April 6th, 1869, and the last, January 17th, 1870; and that the defendants have paid in various payments, extending from the 15th of January, 1870, to August, 1875, \$1,266.13—leaving a balance due, on the 26th of August, 1875, of \$243.18.

The referee does not find directly that the receipt of the \$500 was embraced in the credits given to the defendants, so as to reduce the balance to \$243.18, but does virtually so find, by finding that the balance due is \$243.18. But if the credit of \$500 had been allowed in addition to the other credits, it would have brought the plaintiffs in debt to the defendants several hundred dollars, which was never claimed by the defendants. This exception should have been overruled.

As to the first and third exceptions—The referee finds the facts, that J. L. Henry was the attorney for the defendants; and also that W. M. Cocke, Jr., attorney for the plaintiffs, to whom the matter was originally entrusted for settlement, delayed bringing an action against the defendants, because of the repeated promises of the defendant, G. M. Roberts, to settle the matter and pay whatever might be due, and the further promise of J. L. Henry or G. M. Roberts that they, the defendants, would not rely upon the statute of limitations.

The conclusion upon this finding was that the statute of

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limitations did not bar the plaintiff's action, and His Honor sustained the exception to this ruling of the referee, and, in that, we think he erred. We lay out of view the question whether the promises to pay should have been in writing, or whether they were sufficiently explicit to amount to such acknowledgments as would take the case out of the operation of the statute; for the facts of the case oppose an equitable obstruction to the statute, which makes these other considerations needless.

Our courts, as now constituted with a blended legal and equitable jurisdiction, will prevent a party from setting up an unconscientious defence. Thus, it was held in *Haymore v. Commissioners*, 85 N. C., 268, that the defendants will not be allowed to set up the statute of limitations in bar of the plaintiff's claim, when the delay, which would otherwise give operation to the statute, has been induced by the request of the defendants, expressing or implying their engagement not to plead it.

The same doctrine is announced in *Lyon v. Lyon*, 8 Ired. Eq., 201, where it was held that the neglect to prosecute a legal claim within the proper time, though arising from mistake, amounts to laches; and the party must abide the consequences, unless the other party either agreed not to take advantage of the delay, or contributed to bring about the delay.

The same principle was decided in *Daniel v. Commissioners*, 74 N. C., 494, and this was a case where the agreement was made with the defendants' attorney. Here, the promise was made either by the defendants or their attorney. But it was made by the one or the other, and it makes no difference which, according to the last cited case. To the same effect is *High on Inj.*, § 72, and *Story Eq. Juris.*, § 1521. There is error. Let this be certified to the end that judgment may be rendered in conformity to this opinion.

Error.

Reversed.

LAFOON v. SHEARIN.

*POLLY ANN LAFOON v. ELIZA SHEARIN.

Venue—Jurisdiction.

If the county designated in the summons be not the proper county to try an action, still, the trial may proceed unless the defendant, *before the time of answering expires*, demand in writing that the case be removed to the proper county. THE CODE, § 195. This statute applies to actions for the recovery of real estate, as well as to personal actions.

Ejectment tried at Fall Term, 1884, of WAKE Superior Court, before *Gudger, J.*

The plaintiff appealed.

Mr. D. G. Fowle, for plaintiff.

Messrs. Fuller & Snow and *E. C. Smith* for defendant.

SMITH, C. J. This action is for the recovery of possession of land and the allegations contained in the complaint are all controverted in the answer, which was filed at June term, 1880, of the superior court of Wake. When the cause was called for trial at August term, 1884, it was suggested by the defendant, and the fact admitted by the counsel for the plaintiff, that the land in dispute was entirely in the county of Granville and the court had no jurisdiction in the premises.

The court being of this opinion, although no objection of this kind had been before made, and that the court could not take cognizance of the cause, refused to reserve the point and proceeded with the trial, and dismissed the action, and from this judgment the appeal is taken to this court.

*Mr. Justice MERRIMON, having been of counsel, did not sit on the hearing of this case.

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THE CODE, in sections 190 to 194 inclusive, prescribes the places of trial and designates the several counties in which civil actions must be tried, subject to the power of the court to remove to another county, and then follows section 195 in these words :

“ If the county designated for that purpose in the summons and complaint be not the proper county, the action may notwithstanding be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties or by order of the court.”

This section indiscriminately embraces all the previously enumerated actions as well as those for the recovery of real estate, which under the former system of pleading were called local actions, as those which were transitory or personal actions. The jurisdiction may depend upon the subject matter of the suit, as in the cases provided for in section 190; or the place where the cause of action arose, as provided in section 191; or upon the residence of the parties to the suit, as provided in section 192; or upon the conditions in sections 193 and 194; but all are embraced in the sweeping enactment that follows and requires every objection to the assumed jurisdiction to be made, *in limine* “before the time of answering expires.” Then the cause is not dismissed, but is to be transferred to the court of the proper county and be tried, as if the action had been begun in that county.

We were disposed at first to think that real actions, where the defect of jurisdiction lies in the subject matter, may not have been intended to come within the operation of this section, and perhaps this may not have been the intent of the law making power. But upon a fuller consideration, we do not see how such a limit can be put upon the language, and its scope thus restricted.

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The provision admits of no exception, and we cannot by construction make one.

"The action," thus wrongfully commenced, whatever may be its form or object, is upon exception to be removed and constituted in the court of the proper county; and when no exception is thus taken, the court of the county in which the action is brought under the statute acquires a jurisdiction and may proceed.

There was, therefore, error in the ruling and in the judgment dismissing the action, and it is reversed. Let this be certified to the end that the judgment in the court below be reversed and the cause proceed therein according to law.

Error.

Reversed.

*HINSON & CUMMING v. ADRIAN & VOLLERS and others.

Appeal, effect of—Proceeds of sale under care of court below, during pendency of appeal.

1. A fund raised by sale under decree is not transferred to this court by appeal from a judgment directing its distribution, and hence no application to make a disposition of it by investment, pending the appeal, will be entertained here.
2. The appeal arrests all proceedings in the court below upon the judgment appealed from, but does not withdraw from it the authority to order that proper security be given for the safe keeping or investment of the fund, pending the appeal.

(*Isler v. Brown*, 69 N. C., 125, cited and approved.)

*Mr. Justice ASHE did not sit on the hearing of this case.

HINSON v. ADRAIN.

CIVIL ACTION, tried at Spring Term, 1884, of ANSON Superior Court, before *Philips, J.*

This action is prosecuted by creditors of the defendant Harvey T. Knotts, whose judgments have been docketed in the superior court of Anson and Union, to enforce the foreclosure of a mortgage of lands lying in those counties, which had been executed to him by his co-defendants, to the end that any excess of the proceeds of sale not required to discharge the secured debts might be applied to the payment of theirs.

Under judgments several sales have been made and set aside upon the offer of an advanced bid upon a resale, the last of which was made and reported at spring term, 1884, as having brought the aggregate sum of \$8,331, and that this was a fair price. Thereupon the debtor set up his claim to a homestead in the lands, and asked that the sale be again set aside so that his exemption therein might be separated and assigned and the residue only be sold. The creditors opposed the motion, but assented to his taking the sum of \$1,000 from the fund as the full value of his homestead-claim, insisting that the sales had been made with his consent and it was now too late to assert the claim in this form.

The sale was made by the clerk, designated as commissioner for that purpose, according to the terms of the order, for cash, which he reported as having been paid and then in his hands.

The court refused the application, confirmed the report, and made a final adjudication appropriating and distributing the entire fund, and the said Knotts appeals therefrom.

Messrs. J. D. Shaw and J. W. Hinsdale, for plaintiffs.

No counsel for defendants.

SMITH, C. J., after stating the above. No direction was

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given in respect to the money, its safe-keeping or investment pending the appeal, and this court is now moved, after notice given to parties interested, for an order making an intermediate disposition of the money, either in returning it to the purchaser on his giving adequate security for its return when demanded, or in lending and converting it into an interest-bearing debt properly secured, and to be paid when the court shall require.

The motion proceeds upon the misconception of the legal effect of the appeal, and the condition and status of the case resulting therefrom. The fund is not thereby transferred to the appellate court, or the authority to be exercised for its preservation withdrawn, but it remains in the custody and under the care of the superior court, as before, until the decision upon the appeal has been rendered. Meanwhile that court may make all necessary orders in reference to it, upon application of parties interested in its safety and final disposition.

This is apparent from the statutory provisions in regard to appeals. The appeal, when perfected so as to secure the final judgment in the appellate court, arrests "all further proceedings in the court below *upon the judgment appealed from or upon the matter embraced therein.*" But the court is expressly authorized to "*proceed upon any other matter* included in the action and not affected by the judgment appealed from."

It is only the subject matter involved in the judgment that is thus placed beyond interference, and not those incidental matters appertaining to jurisdiction and often necessary in securing the full fruits of the judgment that may be rendered in the appellate court. THE CODE, § 588.

This construction is sustained by the provisions found in section 554, preceding, which authorizes the court, when the sureties to the undertaking on appeal become insolvent, to require a new undertaking from the appellant; to dis-

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pose of money deposited in place of an undertaking, during the pendency of the appeal; to order any money deposited with officers to be transferred to the court; and where perishable property is adjudged to be sold, and the appeal is from the judgment whereof this is part, to direct a sale and the proceeds to be deposited or invested to await the determination of the appeal.

These provisions clearly indicate the retention by the superior court of the powers necessary to the preservation of the funds in litigation, and subsidiary to the practical ends of the action. Nor are they in conflict with the series of adjudged cases which declare, that the effect of an appeal from a final judgment is to remove the cause into a higher court and make the affirmation of it therein a final and complete disposition of the controversy involved in the action. *Ialer v. Brown*, 69 N. C., 125.

This cause is removed by the appeal to another jurisdiction, but the auxiliary agencies employed in the court below, in furtherance of its purposes, remain under the control of the judge thereof until the termination of the action, unless superseded by some proper order in this court. When a final determination is reached in either, these agencies will be required to do whatever is necessary to the full execution of the judgment and render it effectual.

As the appeal does not transfer the fund, which remains in charge of the court below, the judge possesses the power, and to him the application should be made, to make such orders in regard to it, as the interests of the parties may require for its preservation and forthcoming when required. The motion is denied.

Motion denied.

MOORE v. INGRAM.

B. W. MOORE v. JOHN INGRAM, Adm'r.

Executors and Administrators—Special Proceeding—Jurisdiction—Judgment—Homestead—Vendor's Lien does not obtain here.

1. Administrator filed petition against heirs of intestate to sell land for assets; issues were joined and the proceeding transferred to court in term, and upon the trial the issues were found in favor of the administrator; the judge gave the license to sell and also directed how the proceeds of sale should be applied; *Held*,
 - (1) The court intimate that the judge had no power to order the sale.
 - (2) The jurisdiction to direct the application of the proceeds is exclusively in the clerk.
 - (3) The plaintiff in this case was not a party to the special proceeding for the order to sell, and is therefore not concluded or affected by the judgment therein rendered.
 2. A judgment consisting of several distinct and independent parts may be good as to one part and erroneous as to the others.
 3. A judgment against an administrator founded upon a debt of the intestate contracted for the purchase of land, has no precedence over debts of the same class to be satisfied out of assets raised by the administrator under an order to sell the land.
 4. There is no homestead right involved here; nor does the vendor's lien obtain in this state.
- (*Satterwhite v. Carson*, 3 Ired., 549; *Hoskins v. Wall*, 77 N. C., 249; *Womble v. Battle*, 3 Ired. Eq., 182; *Smith v. High*, 85 N. C., 93, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1884, of MAcon Superior Court, before *Graves, J.*

This was a creditor's bill filed by the plaintiff, in behalf of himself and the other creditors of the estate of T. A. Lowery, deceased, against the defendant as his administra-

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tor, under the act of 1871-'72, ch. 213, § 1. (Bat. Rev., ch. 45, § 73.)

The case presented by the record transmitted to this court is as follows :

The clerk of the superior court, before whom the special proceedings were had, found as facts, that T. A. Lowery died intestate in 1869, and the defendant qualified as his administrator in 1875.

In 1875, W. M. Patton obtained a judgment in the superior court against said administrator for \$492.05, the balance due on purchase money for land sold by Patton in the year 1859.

The plaintiff obtained judgment before a justice of the peace on the 14th of September, 1878, for \$104, and costs against said administrator.

The administrator on the day , 18...., filed his petition for license to sell his intestate's land to pay the judgment in favor of Patton, when the heirs of the intestate resisted the petition, insisting that the judgment was unjust and that the purchase money for the land had been paid. The issues thus raised were transmitted to the superior court in term for trial. They were submitted to a jury under the direction of the court and found in favor of the administrator. Thereupon, at spring term, 1880, before *Schenck, J.*, the petition was heard and an order made directing the administrator to sell the land and apply the proceeds to the Patton judgment, and pay the residue, if any, to any debts outstanding against his intestate's estate.

The land was accordingly sold, and it brought \$305, which the administrator applied to the Patton judgment; and from the report of the defendant in his final settlement, the proceeds of this sale were the only assets that ever came to his hands.

Upon this state of facts the clerk of the superior court adjudged that the administrator had disbursed the assets

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properly by paying the same on the Patton judgment, and the plaintiff excepts to this, for that, both Patton's and his own debt belonged to the seventh class as provided in Bat. Rev., ch. 45, §§ 40, 41, and must be paid *pro rata*; and further, the clerk finds as a fact that the \$305, assets, were received at spring term, 1880, and that plaintiff obtained his said judgment of \$104 on the 14th of September, 1878, and that defendant paid all the assets on the debt of Patton: Wherefore the plaintiff says that the same is in violation of law, and asks that he may be allowed his *pro rata* share thereof. The exceptions of the plaintiff were overruled, the report confirmed, and the plaintiff appealed to the judge, who, at spring term, 1884, affirmed the judgment of the clerk; and it was further adjudged that the plaintiff and his surety pay the costs of this action. From which judgment the plaintiff appealed to this court.

Mr. Geo. A. Jones, for plaintiff.

Messrs. Reade, Busbee & Busbee, for defendant.

ASHE, J. We are of opinion there is error in the judgment pronounced by His Honor in affirming the judgment of the clerk, for there is also error in the judgment of the clerk in overruling the exception taken by the plaintiff. The plaintiff's exception should have been sustained.

The ruling of the clerk seems to have been predicated upon the idea that the judgment pronounced by the judge at spring term, 1880, giving to the defendant license to sell the real property of his intestate, and adjudging that out of the proceeds of the sale he should in the first place satisfy the judgment in favor of Patton, was a judgment warranted by law and conclusive upon the plaintiff.

Conceding that the judge had the right to render a judgment in the case granting a license to sell the land, about which there was no point made, we are of opinion he had

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ne right or authority, in that judgment, to direct how the proceeds of the sale should be applied. That was a matter which belonged exclusively to the jurisdiction of the clerk. C. C. P., §§ 433, 434. The judge in term has no jurisdiction over the settlement of intestates' estates, except in cases where the action in nature of a creditors' bill is brought by a creditor under the act of 1870-'71, (THE CODE, § 1448,) and in some cases where the court of equity takes jurisdiction.

If the judgment rendered by the judge had any conclusive effect at all, it was only so far as it gave the license to sell the land; and that was for the reason the administrator in that particular represented the creditors. But the adjudication upon the question of the application of the assets was extra-judicial, and therefore not conclusive. A judgment, consisting of several distinct and independent parts, may be good as to one part and erroneous as to the others. *Satterwhite v. Carson*, 3 Ired., 549. But if the judgment in question has any validity at all as to the latter part, it is a judgment *inter partes*, and the maxim *res inter alios acta alteri noceri non debet* governs the case. "The application of the maxim to the law of judgments requires that no person shall be affected by any judicial investigation to which he was not a party, unless his relation to some of the parties was such as to make him responsible for the final result of the litigation. It is a general rule that an adjudication takes effect only between the parties to the judgment, and that gives no rights to or against third parties." Freeman on Judgments, § 154.

And in Broom's Legal Maxims, 705, we find it laid down as a general principle, that a transaction between two parties in judicial proceedings ought not to be binding upon a third party, for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous.

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In Starkie on Evidence the same principle is announced in the following passage: "It is an elementary rule and principle of justice that no man shall be bound by the act or admission of another, to which he was a stranger, and consequently no one ought to be bound as to the matter of private right by a verdict or judgment to which he was not a party; when he could make no defence; from which he could not appeal; and which may have resulted from the negligence of another; or even may have been obtained by fraud and collusion."

But the defendant's counsel contended in the argument before us that the proceeds of the sale were first to be applied to the Patton judgment, because the judgment was founded upon a debt contracted by the defendant's intestate for the purchase of the land, and, by article ten section two of the constitution, "no property shall be exempt from sale for the payment of obligations contracted for the purchase of the premises," and that the land being thus made liable for the purchase money, its liability continued in the hands of the heirs after the death of the purchaser, and attached to the proceeds of the sale, when sold by the administrator to make assets.

The answer to that is—The section of the constitution referred to provides a homestead for each resident of the state by exempting from sale under execution land owned and occupied by him, not exceeding one thousand dollars in value, but excepts from the exemption the sale of the land for the payment of the purchase money. The exception applies exclusively to the case where a homestead is claimed in the land sought to be subjected to the payment of the purchase money, and has no application to a case where the homestead right is not involved. In a case where there is no right of homestead against the debt, as where (as in this case) it is an old debt contracted prior to the constitution of 1868, the constitution does not interfere with the

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relations of creditor and debtor, but leaves them as they existed before its adoption.

The position taken by the counsel can only be supported upon the idea that a judgment founded upon the debt contracted for land creates a lien on the land for the purchase money. But in this state it has been well settled that there is no such thing as a vendor's lien, *Hoskins v. Wall*, 77 N. C., 249; *Womble v. Battle*, 3 Ired. Eq., 182; *Smith v. High*, 85, N. C., 93. In the last cited case it was expressly held that the law in regard to the vendor's lien was not changed by the constitution of 1868, and that the exception in the second section of article ten gave no lien to the holder of a note for the purchase money of land, but provided simply that if such holder shall obtain a judgment on the instrument and issue his execution against the vendee, his right to a homestead in the land purchased by him shall not be an impediment to the sale of the land. But, as we have shown, that question cannot arise where the debtor, as in the case of the Patton judgment, was not entitled to a homestead. Nor does it arise in the case of Moore's judgment, for there is no point made in the record about a homestead. And we must take it that there was no one entitled to a homestead in the land sold by the administrator, or a claim for it would have been set up, or at least made a point in the case.

We are of opinion the exceptions of the plaintiff should have been sustained, and the proceeds applied to the two judgments *pro rata*, if there are no other debts in the same class; but if there are, then to all of them *pro rata*.

There is error. Let this be certified to the superior court of Macon county that the case may be proceeded with in conformity to this opinion and the law.

Error.

Reversed.

 DAVIS v. HIGGINS.

JOHN DAVIS v. ALBERT HIGGINS.

Deed, registration of—Hand-writing, proof of—Color of Title—Ejectment—Evidence—Parties—Plaintiff's transfer of interest.

1. Where the maker and subscribing witnesses to a deed are dead, proof of the hand-writing of one of the witnesses thereto is sufficient to authorize its probate and registration; and if the witness states he is well acquainted with the hand-writing of the deceased witness, he is qualified to testify; and if the land is situate in two counties, probate of the deed before the clerk of either county is sufficient.
2. An ancient deed accompanied with possession is evidence of color of title without proof of its execution; and an unregistered deed, where there has been a continuous adverse possession for seven years, is also evidence of color of title.
3. The rule that plaintiff is entitled to recover all the land described in the deed to himself, not covered by actual occupation or *possession pedis* for thirty years, does not apply to a case where the evidence shows that defendant's possession, extending over that period, was under deeds with definite boundaries professing to pass title.
4. One who is interested in the result of a suit and employs counsel to attend to it, is not thereby made a party of record; nor does a published notice requiring him to plead have that effect. Such one is not judicially known in the case, and therefore not exposed to judgment.
5. Where the plaintiff transfers his interest in the subject matter of controversy, the cause may still proceed in his name, or the assignee may be allowed to be substituted in his place. THE CODE, § 188.
6. And if such plaintiff sues *in forma pauperis* and the fact of his assignment is properly brought to the notice of the court, the action will be dismissed, unless security be given for its prosecution.

(*Burnett v. Thompson*, 13 Ired., 379; *Carrier v. Hampton*, 11 Ired., 307; *Barwick v. Wood*, 3 Jones, 306; *Plummer v. Baskerville*, 1

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Ired. Eq., 252; *Campbell v. McArthur*, 2 Hawks, 33; *Hardin v. Barrett*, 6 Jones, 159; *Berryman v. Kelly*, 13 Ired., 269; *Moore v. Fuller*, 2 Jones, 205; *Thompson v. Red*, *Ib.*, 412; *Johnson v. Swain*, Busb., 335, cited and approved.)

EJECTMENT, commenced in McDowell and removed to and tried at Fall Term, 1883, of RUTHERFORD Superior Court, before *Gilmer, J.*

The plaintiff, suing with leave of the court *in forma pauperis*, prosecutes his action to recover possession of the land described in the complaint, alleging the title to be in himself and a wrongful withholding by the defendant. These allegations are directly denied in the defendant's answer, and the only issue submitted to the jury was in this form :

Is the plaintiff the owner in fee and entitled to the possession of the land sued for? To this inquiry the response is, that he is not.

The action was commenced on February 10th, 1880, in the superior court of McDowell, in which county the land is situate, and was removed by consent at spring term, 1882, to the county of Rutherford, and there tried. At the same term and previous to the order of removal, the defendant filed an affidavit wherein he states, that sometime during the previous year the plaintiff executed a quit-claim deed conveying all his interest in the land to certain parties, whose names he mentions, and that they soon after by a similar deed conveyed the same to one Allan Schenck, a wealthy resident in the city of New York, in trust for an association of organized capitalists, who were engaged in mining for gold, and that the suit was now carried on in their interest and for their benefit alone. He thereupon asked that notice be issued to the plaintiff and he be required to give a justified undertaking with sureties to secure his costs, should the plaintiff fail in his action. No response appears in the record to have been made to the application.

At spring term, 1883, of Rutherford superior court, the

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defendant made a motion, founded upon the facts contained in his affidavit, to dismiss the action for the reason that the plaintiff had transferred all his interest in the land to others, and had none now in the pending controversy, while the suit was prosecuted solely for the benefit of the assignees. The motion was refused.

After the trial, pursuant to a notice given, while it was in progress, to opposing counsel, and upon a similar affidavit in substance but more minute in its details, the defendant moved that judgment be entered against said Schenck for his costs, inasmuch as notice had been published under an order of the court requiring the said Schenck to answer or demur to the complaint herein filed, or that judgment will be taken against him for the relief demanded in the complaint. The motion was allowed, and from the judgment against him the said Allen Schenck appeals.

Mr. M. H. Justice, for plaintiff.

Messrs. Sinclair, Forney, and Batchelor & Devereux, for defendant.

SMITH, C. J., after stating the case. From the judgment rendered upon the verdict the plaintiff also appeals, he being allowed to do so without giving the undertaking prescribed by law, and assigns error in the several rulings to which the exceptions contained in the record are taken. These we propose first to consider.

The plaintiff claimed under a grant issued to himself in 1874, which it was admitted covered the land in dispute and put the title in him, unless it had been previously divested, and the state then had none to convey. In deducing his title from older deeds and long and continuous possession under them, the defendant introduced a deed from James James to Roberts, Bryan & Hardin, bearing date on March

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1st, 1830, to the admission of which objection was made by the plaintiff, on the ground of an insufficient probate and unauthorized registration. The probate was before the clerk of Haywood county, and after registration there, upon his certificate, transmitted to McDowell, when probate was again adjudged by the clerk of that county, and the deed again put upon the register's book. The form of the probate was as follows :

"STATE OF NORTH CAROLINA, }
 HAYWOOD COUNTY. }

I, J. K. Boone, clerk of the superior court of Haywood county, do hereby certify that the execution of the foregoing and annexed deed of conveyance was duly proved before me this day by the oath and examination of A. Higgins, who being duly sworn says that James James, the maker thereof is dead, and that William Moore and John Woody are dead or beyond the limits of the state. And it is further proved by the oath and examination of L. L. Moore, that he is well acquainted with the hand-writing of the said William Moore, and that the name of the said William Moore, subscribed as a witness to said deed, is in the proper hand-writing of the said William Moore.

Let the same with this certificate be registered. Given under my hand and official seal this 20th day of November, 1883.

J. K. BOONE,

Clerk of the Superior Court of Haywood County."

The official seal is annexed to the certificate.

The appellant's objection is not pointed to any particular defect in the probate, as warranting registration in McDowell county, but we suppose it rests upon sub-division 8, of section 1246 of THE CODE, which provides specially for the case where both maker and subscribing witnesses are

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dead or non-residents, and authorizes probate to be made before the clerk of the county where the instrument is sought to be registered, and declares such proof sufficient for registration therein.

It does not appear, the deed not being in the transcript, whether it contains also land lying in Haywood, or for what purpose the instrument was sought to be registered in Haywood; and hence, as error to be corrected must be shown, we are unable to see that the case comes under the provisions of the paragraph referred to, and is not within the terms of section 1248, which, when the lands conveyed lie in two counties allows proof before the clerk of either.

The probate is not obnoxious to the objection that the evidence is confined to the hand-writing of one only of the subscribing witnesses, for such is held sufficient in *Burnett v. Thompson*, 13 Ired., 379, nor that it is insufficient because the witness does not show how he acquired a knowledge of the hand-writing, as is held in *Carrier v. Hampton*, 11 Ired., 307.

A probate, in words almost identical with those before us, is declared sufficient in *Barwick v. Wood*, 3 Jones, 306, in the opinion in which PEARSON, J., uses this language: "We think where a witness states that he is *well acquainted* with the hand-writing, he is qualified to testify to it *prima facie*. * * * So the case is distinguishable from *Carrier v. Hampton*, for there the witness did not say he was *well* acquainted with the hand-writing, or even that he was acquainted with it, but swore merely that the signature was in the hand-writing of the grantor."

But the court permitted the deed to be read to the jury, being thirty years old and proving itself, as affording color of title to the defendant.

There was no error in the ruling even if we assume an insufficient probate, since an ancient deed, such as this, accompanied with a consistent possession under it, may be

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read without proof of execution; for as remarked by RUFFIN, C. J., it is the accompanying possession of the land that establishes the authenticity of an ancient deed. *Plummer v. Baskerville*, 1 Ired. Eq., 262. To the same effect is 1 Greenl. Evi., §§ 144, 530.

And again, an unregistered deed is competent evidence of color of title rendered perfect by a continuous adverse possession of the land, according to its terms, for the period of seven years. *Campbell v. McArthur*, 2 Hawks, 33; *Hardin v. Barrett*, 6 Jones, 159.

No exceptions were taken by the plaintiff to the charge given to the jury; none to the instructions prayed for by the defendant; none asked for himself.

In the course of the argument of the plaintiff's counsel, he insisted on plaintiff's right to recover all the land described in the grant to himself, not covered by actual occupation or a *possessio pedis* for the period of thirty years or more, and read the case of *Berrymen v. Kelly*, 13 Ired., 269, to sustain his contention, but no direction to this effect was requested before verdict.

After its rendition, the court was asked to note an exception to the omission to charge upon this point. This was declined because no such instruction was asked, the court adding that if it had been, it would have been refused, because it was not applicable to the proofs offered in this case.

Looking into the evidence of possession and acts of ownership, it will be seen that they were under deeds with definite boundaries professing to pass title, and not a naked occupation, nor mere acts done on the land unsupported by a paper title. These extended over a long period accompanied by deed as far back as 1830, and without such deed, shown in evidence, by the said James James as far back as 1808.

The exceptions of the plaintiff are untenable and we sustain the rulings to which they are taken.

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The appeal of Allen Schenck must be sustained. He was not a party to the action, and although he may have acquired such title or claim as the plaintiff possessed during the progress of the suit, and, being directly interested in the result, may have employed counsel to aid in the prosecution of the suit, these acts did not, (nor did the ordered publication have that effect,) make him a party to it, so as to warrant any judgment against him. The assignment put an end to the plaintiff's interest in the subject matter of controversy, and, under the former practice, if brought to the notice of the court in a plea since the last continuance, would have extinguished his cause of action. Under the present system the cause may proceed, notwithstanding a transfer of the property, in the name of the original party, or the assignee may be allowed to be substituted in his place by the express provisions of the statute. THE CODE, § 188. Had the appellant applied to become a party plaintiff, the court would have required, as a condition in giving leave, that he should give security for prosecuting the action, as he would be outside of the order which dispensed with it for the plaintiff. So, in our opinion, upon the facts brought to its attention, the court would have withdrawn the leave to sue *in forma pauperis* and dismissed the action, unless a proper undertaking was given, as the interest of the original plaintiff had ceased.

But certainly, when the plaintiff had conducted his suit to a verdict, it was not in the power of the court to charge the appellant, who is not judicially known in the action, with the costs incurred by the defendant in a successful resistance to it.

In the superseded form of ejectment, it was decided that the lessor's entry into possession of the land sought to be recovered, would defeat the action; but in order to this, the entry must by a proper plea be brought to the notice

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of the court. *Moore v. Fuller*, 2 Jones, 205; *Thompson v. Red, Ib.*, 412; *Johnson v. Swain*, Busb., 335.

It must be declared there is error on rendering judgment against the appellant Allan Schenck, and the same is reversed with costs.

There is no error in the rulings brought up for review in the appeal of the plaintiff Davis, and they are affirmed.

No error in Davis' appeal.

Error in Schenck's appeal.

Judgment accordingly.

BROWN CHEMICAL COMPANY v. ATKINSON, COBB & CO.

Contracts in commercial transactions—Letter-evidence—Fertilizer Tax—Parol evidence of usage.

1. The letter of a partner submitting propositions in reference to the sale of goods, in response to inquiries of the defendant, is admissible upon trial of an action to recover the price of the goods, as bearing on the contract of sale.
 2. Where a company in Baltimore agrees with a merchant in North Carolina "to give him the right to sell" its commercial fertilizer in this state, the contract is to be interpreted as meaning the *privilege* of selling, which privilege must be acquired by payment of the license tax by the company.
 3. Parol evidence is admissible to show the custom or usage of a place where a contract is entered into; and this, upon the principle, that it is presumed the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to such usage.
- (*Bobbitt v. Ins. Co.*, 66 N. C., 70; *Moore v. Eason*, 11 Ired., 568; *Vaughan v. Railroad*, 63 N. C., 11, cited and approved.)

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CIVIL ACTION, tried at Spring Term, 1884, of WILSON Superior Court, before *Shepherd, J.*

The action was brought to recover for goods sold to the defendants. The allegations in the pleadings are substantially set out in the opinion of this court. It was admitted that the contract of sale was made in the town of Wilson, N. C., and that the goods (the commercial fertilizers) were delivered as alleged.

The correspondence between the parties referred to in the opinion, and bearing upon the contract and the issue submitted to the jury, is as follows :

[Exhibit "A."] BALTIMORE, MD., Dec. 17, 1880.

Messrs. Baker & Cobb, Wilson, N. C. :

GENTLEMEN :—I will give you the right to sell Powell's Prepared Chemicals and Tip Top Fertilizer at Wilson and Sparta, North Carolina, on the following terms: Powell's Chemicals at \$9 cash per formula, f. o. b. here; \$9.50 your note 4 months; \$10 payable November 1st, 1881, as per printed terms sent herewith. Tip Top Fertilizer I will sell you in car load lots at \$27 f. o. b.; 30 days \$28; your note 4 months \$30; payable November 1st, 1881, on terms as printed. Pamphlets will be mailed to every farmer in your state, and the Chemicals advertised in every paper of prominence.

Yours, &c.,

W. S. POWELL, Treasurer.

[-Exhibit "F."] WILSON, N. C., Jan. 14, 1881.

Brown Chemical Co. Baltimore :

DEAR SIRs :—Please ship us to Wilson, N. C., ten tons (1 car load) Tip Top. Prepay freight and we will remit amount of freight. Send circulars, &c., for us to distribute amongst our customers.

Yours truly,

ATKINSON, COBB & Co.

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[Exhibit "G."] BALTIMORE, MD., Jan. 15, 1881.

Messrs. Atkinson, Cobb & Co., Wilson, N. C.:

GENTLEMEN:—Your kind order for ten tons Tip Top Fertilizer to hand which we do not enter, as you do not say on what terms you want it, and our invariable rule is to have all understandings first to prevent misunderstandings afterwards. We submitted two propositions to your partner when in our office: 1st. We would sell you on 30 days' time f. o. b. here *Powell's Chemicals* for any crop per formula at \$8.50, in car load lots, and Tip Top Fertilizer at \$27 a ton, same terms, or if your reference were satisfactory, your note at 4 months, 6 per cent. interest added, would be accepted as cash. The 2d proposition: We would sell you on your note, payable November 1st, 15 and December 1st, equal amounts for your purchase, secured by liens of the farmers to whom the fertilizers were sold, or other satisfactory security, at your option; note bearing interest at 6 per cent. per annum from date of shipments, *Powell's Prepared Chemicals* at \$9 a formula, and Tip Top at \$30 on same terms. All settlements, whether cash or time, to be made in our office within 30 days from date of shipments.

Now, gentlemen, this is not questioning in any way the responsibility of your firm, but it is our way of doing business, and for our correctness and responsibility we refer you to any banker or merchant in the city. If these terms are acceptable, we should appreciate your approximating about what your wants will be. Our orders are coming in very heavy, and we do not wish to disappoint you if we can avoid it.

Yours, &c.,

BROWN CHEMICAL CO.

[Exhibit "H."] WILSON, N. C., Jan. 18, 1881.

Brown Chemical Co., Baltimore:

DEAR SIR:—Yours of 15th to hand. We propose to pay

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cash for whatever we use of the "Tip Top" at prices mentioned in yours. When can you ship us a lot (say car load)? Please let us hear from you. Send circulars, &c.

Yours truly,

ATKINSON, COBB & Co.

We give you for reference Mrs. Townsend, Whitley & Co., of your city.

The issue—"Was it a part of the contract that the license tax was to be paid on the guano by the plaintiffs?"

To show the contract between the parties, the plaintiffs introduced the letters marked "Exhibit F, G, and H."

The defendant, James T. Cobb, was introduced as a witness for the defendants, who testified that on the 17th of December, 1880, he and one J. H. Baker were a mercantile firm in Wilson, under the name and style of Baker & Cobb: that the defendant's firm went into business on the 1st day of January, 1881; that on the said 17th of December the defendant had a conversation with W. S. Powell, one of the plaintiff's firm, in the plaintiff's office in Baltimore, in which he informed him that the defendant firm would go into business on the first of the next January, consisting in part of himself and the said Baker; that he wished to know the terms on which fertilizers could be bought by the new firm when it went into operation, and that thereupon the said Powell wrote a letter addressed to the said Baker & Cobb, which was submitted to the defendant firm in January, 1881, upon which the foregoing letter of defendants to plaintiffs of January 14th, 1881, was written.

The letter to Baker & Cobb, marked "Exhibit A," was then offered in evidence. The plaintiffs objected. Objection overruled, and plaintiffs excepted. The letter was then read in evidence.

T. J. Hadley, a witness for defendants, was asked by defendants' counsel what was the custom of the manufacturers

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and dealers in commercial fertilizers in Baltimore as to the payment of said license tax. Plaintiffs objected. Objection overruled and plaintiffs excepted.

Plaintiffs' counsel was then allowed to examine the witness, before answering the questions, as to the grounds of his knowledge of such custom. Whereupon witness stated that he had been in business since 1871; that since the act establishing said tax he had dealt in four different brands of fertilizers; that his knowledge was based on newspaper reports and advertisement, on the fact that the agent of the department of agriculture had been in Wilson and had not seized the fertilizers; that he had been a member of several firms, and had dealt largely in such fertilizers, and was familiar with the dealings in fertilizers in Wilson and the surrounding country; that he had seen licenses issued to different mercantile firms and the agricultural reports, had heard statements made by the agents of the manufacturers and dealers, and the agent of the department of agriculture; that he did not know, of his own knowledge, that the other dealers in Wilson did not pay said tax, but that it was generally understood and acted upon that the taxes were paid in Baltimore. All the fertilizers that he had seen brought here were marked "tax paid." There is a general warehouse in Wilson in which they are all deposited upon arrival.

The plaintiffs thereupon objected to the witness answering the questions, because he had not qualified himself to do so. The objection was overruled, and plaintiffs excepted.

The witness then testified that he knew what the universal custom was, and what was generally understood and acted upon by the merchants of Wilson and vicinity in their dealings with fertilizer companies in Baltimore; that such custom was that the companies paid the license tax. The plaintiffs excepted.

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The jury responded to the issue in the affirmative. Motion for new trial, &c. Judgment for the defendants, from which the plaintiffs appealed.

Messrs. Strong & Smedes, for plaintiffs.

Messrs. H. F. Murray and Connor & Woodard, for defendants.

ASHE, J. The plaintiffs, partners in trade and doing business in the city of Baltimore, seek by this action to recover from the defendants, merchants and partners doing business in the town of Wilson, North Carolina, the balance of the value of forty tons of "Powell's Tip Top Fertilizer" at twenty-seven dollars per ton, sold and delivered to the defendants between January 1st and March 1st, 1881, at Wilson.

The plaintiffs allege that only the sum of \$595 has been paid by the defendants, and they demand judgment for the balance.

The defendants plead a counter-claim, and allege that the plaintiffs agreed to give them the right to sell the fertilizer in North Carolina, the right to do which could only be acquired by the payment of a tax of \$500 to the board of agriculture; but that after the receipt of the goods at Wilson, in consequence of the failure of the plaintiffs to pay said tax, the fertilizer was seized by the commissioner of agriculture and the defendants were compelled to pay the \$500 tax to relieve the fertilizer from the seizure.

The only issue raised by the pleadings which was submitted to the jury, was:

"Was it a part of the contract that the license tax was to be paid on the guano by the plaintiffs?"

On the trial of the issue several exceptions were taken by the plaintiffs to His Honor's ruling in the admission of testimony, and to his refusal after verdict to grant a new

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trial because of errors assigned in his rulings, and his refusal to render a judgment, notwithstanding the verdict, upon the admission of the defendants.

The first exception was to the admission of the letter written by W. S. Powell, treasurer, to the defendants, dated Baltimore, December 17th, 1880, and marked "A" in the record. The ground of the objection to the reception of the letter is not stated in the record. If Powell was one of the firm of the Brown Chemical Company, the letter was admissible as a proposition from the company. James T. Cobb, one of the defendants examined as a witness in their behalf, testified that before the date of this letter he was in Baltimore in December, 1880, and had a conversation with Powell, the writer of the letter, who was one of the partners of the plaintiff firm, in their office, in reference to the terms upon which he and his partners could purchase fertilizers from the plaintiff company, and afterwards they received the letter in question from the plaintiffs. In the plaintiffs' letter to them, marked "G," they say, "we submitted two propositions to your partner when in our office." This evidently referred to the interview between the witness Cobb and Powell, for it does not appear that either of the partners of the defendant firm was at any other time in their office; and it recognized Powell as a partner, and also the propositions made by Powell to Cobb. For the propositions of Powell were not made at that time, but subsequently, in the letter of date December 17th, 1880, in response to the inquiries made by the defendant Cobb at the interview in the office. And Powell being shown to be a partner, the letter was admissible in evidence; and it was proper to be left to the jury, in connection with the other letters offered in evidence, as bearing upon the issue before them.

The letters were all about the same subject matter between the same parties, and referring to the same contract, and were therefore admissible. *Robbitt v. Insurance Co.*, 66 N.

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C., 70; Starkie on Evi., 95; 2 Parsons on Cont., 553; *Colburn v. Dawson*, 10 C. B., 4 Eng. L. and Eq., 378.

The letters objected to had a direct and important bearing upon the question submitted to the jury. The plaintiffs, through their partner Powell, say, "I will give you the right to sell 'Tip Top Fertilizer' at Wilson and Sparta, North Carolina," upon terms thereafter mentioned. What was the right stipulated to be given? Can it be other than the privilege of selling the article in this state? But by section 2190 of THE CODE, that privilege can only be acquired by paying the tax of \$500, and to give the privilege necessarily implied that the plaintiffs had acquired the privilege to do so.

The second and third exceptions were to the ruling of the court in admitting evidence in regard to the custom of manufacturers and dealers in commercial fertilizers in Baltimore, as to the payment of said license tax. The plaintiffs objected to the introduction of the testimony and to the competency of the witness who was offered to establish the custom.

The witness (Hadley), after stating the means and opportunities he had had of obtaining a knowledge of the custom (which we think were sufficient to make him competent to speak of the custom), testified that he knew what the universal custom was, and what was generally understood and acted upon by merchants of Wilson and vicinity in their dealings with fertilizer companies in Baltimore; and that *such custom was that the companies paid the license tax.*

We are of opinion the testimony of the witness was sufficient to establish the existence of the custom or usage in the town of Wilson, and afforded evidence, pertinent to the issue, to be considered by the jury, for it was admitted on the trial that the contract was made in the town of Wilson; and every contract with respect to any business or dealing, when the contrary is not expressed, or cannot be reasonably ferred, is presumed to be made with reference to the usage

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of the place where it is entered into. The question, then, propounded to the witness—what was the custom of manufacturers and dealers in commercial fertilizers in Baltimore, as to the payment of the license tax? must be taken as having reference to those dealings with traders in the town of Wilson. And it is well settled that parol evidence may be admitted to show a custom or usage of a *place* where a contract is entered into, for the purpose of annexing incidents to, and explaining the meaning of terms used in it, *Moore v. Eason*, 11 Ired., 568; and this court in deciding that case relied upon the case of *Hutton v. Warren*, 1 M. & W., 475, which is a leading English decision upon the subject, where it was held that, in commercial transactions, extrinsic evidence of a custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed. And this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to these known usages. On same point, we refer to Starkie on Evi., 709; *Wigglesworth v. Dollison*, Doug., 201; *Van Ness v. Packard*, 2 Pet., 137, and *Vaughan v. Railroad*, 63 N. C., 11.

The fourth exception, to the refusal of His Honor to grant a new trial, cannot be sustained, for that was a matter within his discretion.

And the last exception which was to his refusal to render judgment in behalf of the plaintiffs, *non obstante veredicto*, was properly overruled, for we see nothing in the record which could have warranted the court in rendering such a judgment.

There is no error, and the judgment of the superior court is therefore affirmed.

No error.

Affirmed.

RUFFIN v. HARRISON.

SAMUEL RUFFIN and others v. C. B. HARRISON and others.

Modification of Judgment—Rehearing.

A rehearing will not be granted upon a summary motion to modify a final judgment of this court. See *ante*, 76.

(*Moore v. Hinnant*, 90 N. C., 163, cited and approved.)

MOTION to modify judgment, heard at October Term, 1884, of THE SUPREME COURT.

Messrs. Reade, Busbee & Busbee and *J. B. Batchelor*, for plaintiffs.

Messrs. Fuller & Snow and *E. C. Smith*, for defendants.

MERRIMON, J. At this term of the court the defendants, Ellis and wife and Penelope Egerton, filed their petition to rehear, and they prayed therein that an injunction be granted restraining the collection of the execution heretofore issued in this case against them, pending the application to rehear. We denied the motion for an injunction, and our opinion in that respect (*ante*, 76) was taken as a strong intimation that the application to rehear would be denied upon the final hearing upon the merits.

The same parties then filed their other petition alleging that the defendant M. F. Harrison is liable for, and ought in equity to be required to pay, for their exoneration, the sum of money they are required by the final decree in this action to pay: and they pray that the court will amend and modify its decree entered at the last term, so as to give the relief demanded.

We need not consider now, whether or not the petitioners might have the relief they demand in a proper action for that purpose: or whether they might have litigated their

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rights as against the defendant M. F. Harrison and had any measure of relief in this action before the final decree; because, the court has no power to amend or modify the final decree, entered at the last term, upon an application like this.

After final judgment, the court cannot disturb it, unless upon an application to rehear, or for fraud, accident or mistake alleged in an independent action; or, perhaps, in some cases, a party might be relieved against a "judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect," within a year after the entry of the same. THE CODE, § 274; *Moore v. Hinnant*, 90 N. C., 163. This of course does not imply that the court has not power to correct the entry of its orders, judgments and decrees so as to make them conform to the truth of what the court did in granting them, or to set aside an irregular judgment in a proper case.

The practical effect of granting the prayer of the petitioners would be to give them the benefit of a rehearing, upon a summary application to change the final decree at a term of the court subsequent to that at which it was granted. We are not aware of any rule of procedure or practice that warrants such action. The application must be denied, and the petition in this respect dismissed. It is so ordered.

Petition dismissed.

HURST, MILLER & CO. v. EVERETT & EVERETT.*Counter-claim—Set-off—Recoupment—Jurisdiction.*

1. A counter-claim includes any defence (except a demurrer) which does not amount to a plea in bar. THE CODE, § 244.

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2. But, strictly, a counter-claim is a cross-action against the plaintiff in which the defendant may have affirmative relief; but it must, like a complaint, state the cause of action and demand the relief to which the defendant alleges he is entitled; and it therefore falls under the limitation to the jurisdiction of a justice of the peace.

3. And if no relief be prayed, it is not a cross-action, but may be either a set-off or recoupment: —

A set-off, when the defence is a distinct and independent cause of action arising in contract, and out of a transaction extrinsic to the plaintiff's cause of action;

A recoupment, when the defence is matter growing out of or connected with the subject of the action, that is, a defendant sued for a debt or damages may diminish the damages suffered by himself on account of the plaintiff's breach of the *same contract*.

4. Therefore, where plaintiff sues for goods sold and delivered or upon notes given therefor, the defendant may set up a counter-claim for damages sustained by the plaintiff's failure to deliver goods of the quality contracted for, and recoup the damages he has suffered to the amount claimed in plaintiff's complaint; and when several actions are brought in a justice's court upon notes, as here, he has the right to set up such defence in each, until the amount of his damages is exhausted; and on appeal to the superior court where the actions were consolidated he has the right to recoup the whole amount of such damages.

(*Bozett v. Vaughan*, 85 N. C., 363; *Meneely v. Craven*, 86 N. C., 364; *Garrett v. Love*, 89 N. C., 205; *Derr v. Stubbs*, 83 N. C., 539; *McClenahan v. Cotten*, *Ib.*, 332; *Lutz v. Thompson*, 87 N. C., 334. cited and approved.)

CIVIL ACTION, tried at Spring Term, 1884, of SWAIN Superior Court, before *Graves, J.*

The action originally consisted of five distinct actions, tried before a justice of the peace and carried by appeal to the superior court.

The facts are that the plaintiffs sold the defendants, by sample, \$800 worth of boots and shoes, and guaranteed they should be of like quality with the samples. Before the goods were shipped, the several notes, offered in evidence,

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were mailed to the defendants and signed by them and returned to the plaintiffs.

The five actions brought before the justice of the peace were for these goods, sold and delivered, and each action was to recover an amount corresponding with the amounts of the several notes. The corresponding notes were offered in evidence in support of the plaintiffs' complaint in each case. The execution of the notes was not denied.

The defendants answered in each case, claiming a "set-off and counter-claim" for damages sustained by them by reason of the failure of the plaintiffs to supply goods of the quality contracted for. The justice gave judgment for the plaintiffs in each case, and the defendants appealed to the superior court, where, on motion of the defendants' counsel, the several actions were consolidated.

On the trial in the superior court, the plaintiffs offered in evidence the notes of the defendants, and, the notes not being denied by them, the plaintiffs rested their case.

The defendants objected that though judgments had been rendered on the notes by the justice of the peace, they had not been "dashed." The court said, while it was proper to write the word "judgment" across the face of the notes on which judgments were given, yet the failure of the justice to do so did not render the notes incompetent evidence.

The defendants then offered evidence that since these judgments were rendered, the notes had been withdrawn from the justice's court, and a suit brought on them in the federal court at Asheville, which was then pending on a plea of abatement; but His Honor held that, notwithstanding such suit, the state court having acquired jurisdiction was not ousted of it, and no judgment having been pleaded, and no plea of *lis pendens* having been made, the court here must proceed with the case.

The defendants offered to show that the goods shipped to them by the plaintiffs were not of the quality repre-

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sented by the samples, but were in fact inferior, and not worth as much by fifty per cent.; and they insisted that by reason of the false warranty they had sustained damages for a large amount—at least four hundred dollars.

The court being of opinion that, as the contract of purchase was one transaction, the damages arising out of it were not divisible, and that the justice of the peace had no jurisdiction, for that, according to the defendants' own showing, it was for more than two hundred dollars; and no part thereof being remitted and the justice not having jurisdiction of the counter-claim, the superior court on appeal had no jurisdiction, although the several actions had been consolidated, and, although the defendants insisted, (the actions having been consolidated,) they had the right to set off damages to the amount of \$800.

His Honor therefore ruled that no counter claim had been pleaded of which the court had jurisdiction; and, being further of the opinion that defendants having given the said notes for sums within a justice's jurisdiction, and there being no suggestion that the same was done in fraud of jurisdiction, His Honor directed a verdict to be entered for the plaintiffs, and the defendants appealed.

No counsel for plaintiffs.

Messrs. Battle & Mordecai, for defendants.

ASHE, J. The defendants pleaded before the justice a "set-off and counter claim," and to sustain their defence offered to show that the boots and shoes, for which the notes were given, were not of the quality recommended by the plaintiffs; and on the trial in the superior court they offered evidence to the effect that the "boots and shoes" were not of the quality represented by the samples, and by reason of the false warranty they had sustained damages to the amount of four hundred dollars. But His Honor

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charged the jury that the defence set up could not avail the defendants, for the reason that no counter-claim had been proved of which the court had jurisdiction; and as the contract of purchase was not divisible and the claim for damages set up was for more than two hundred dollars, the justice of the peace had no jurisdiction.

If the defence set up by the defendants was a counter-claim in the strict sense of that term, His Honor's ruling was correct, that is, if the defendants had pleaded the counter-claim as a cross-action against the plaintiffs. But that, they have not done.

In those cases where it has been held that a justice of the peace had no jurisdiction of a counter-claim for a demand over two hundred dollars, the counter-claim was set up as a cross-action, and judgment was demanded against the plaintiffs. *Boyet v. Vaughan*, 85 N. C., 363; *Meneely v. Craven*, 86 N. C., 364.

A counter-claim as defined in THE CODE, § 244, is:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action.

A counter-claim includes every defence to the action, except a demurrer, which does not amount to a plea in bar. It therefore includes recoupment and set-off, and yet neither of these is a counter-claim in the strict sense of the term. In that sense, a counter-claim is a cross-action against the plaintiff, and in stating the cause of action it is governed and judged by the same rules which apply to the complaint: the facts alleged must be sufficient to constitute the cause of action, and the relief to which the defendant is en-

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titled should be properly demanded, *Pomeroy on Rem. and Rem. Rights*; *Garrett v. Love*, 89 N. C., 205.

Where the counter-claim does not pray for relief against the plaintiff, it is not a cross-action, but may be either a set-off or recoupment. A set-off is very clearly included in the second sub-division of section 244, and it is recognized as a plea that is warranted by THE CODE in *Derr v. Stubbs*, 83 N. C., 539 and *McClenahan v. Cotten*, *Ib.*, 332. In the latter case, the court held that a *cross-demand* may be pleaded in bar, as formerly, if it be equal to or greater than the plaintiff's demand; or the defendant may plead it as a *defence*, so called, under THE CODE, the defence having no other operation than to defeat the action, and not admitting of a judgment; or he may, if he will, instead of pleading it as a bar merely, set up his demand under the name and with the proper prayer of a counter-claim, in which case he may have judgment for the excess.

Set-off, recoupment and counter-claim are here recognized as the only modes by which a defendant may use his cross-demand in an action brought by the plaintiff against him.

We have defined counter-claim proper. A set-off, as originally provided by statute, was the right of a defendant when sued for a debt to counter-balance it, in whole or in part, by setting up as a defence a demand of his own against the plaintiff. Under the old system, it was required to be a certain demand, or one that might be reduced to a certainty; but it is enlarged by THE CODE, and now, under the second sub-division of section 244, embraces the setting up of any cause of action arising in contract. *Bliss on Code Pleading*, § 378. But a set-off always arises out of a transaction extrinsic to the plaintiff's cause of action. *Waterman on Set-off*, 40.

A recoupment is a defence by which a defendant, when sued for a debt or damages, might recoup the damages suf-

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ferred by himself from any breach by the plaintiff of the *same contract*. Pomeroy, *supra*, § 731. And in *Lutz v. Thompson*, 87 N. C., 334, it is held that where a justice has jurisdiction of the principal matter of an action, he also has jurisdiction of incidental questions necessary to its determination, and hence may even admit an equity to be set up as a defence.

There are many resemblances and dissimilarities between these several defences. In a counter-claim to an action upon a contract, where a judgment is prayed against the defendant, he may recover the excess, if any. If no judgment or relief is prayed, it is a set-off, if it is a claim distinct from and independent of the action. But if it is a matter growing out of or connected with the subject of the action, then it is recoupment.

In our case the defendants pleaded "set-off and counter-claim," but they demanded no relief against the plaintiffs, and the defense set up arose out of the contract set forth in the complaint, and their defence therefore fell under the head of recoupment. That being so, there can be no reason why the defendants may not recoup the damages sustained by reason of the breach of contract by the plaintiffs, irrespective of the amount. It is not a counter-claim where relief is demanded, which, being a cross-action, is therefore held to fall under the limitation to the jurisdiction of a justice of the peace.

This view of the case, founded upon the statutes, the authorities, and the "reason of the thing," leads us to the conclusion, that when the defendants were sued, no matter whether for goods sold and delivered or upon one of the notes given in payment therefor, they had the right to recoup the damages they had sustained to the amount of the sum claimed in the plaintiff's complaint, and so on in each action, "*toties quoties*," until the amount of their damages should be exhausted. And this defence, having attached to the action while in the justice's court, followed the cases on

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appeal; and when the several actions were consolidated in the superior court, the defendants had the right to recoup the whole amount of such damages, as they might be able to prove they had sustained, from the plaintiffs' recovery.

There is error. Let this be certified to the court below that a *venire de novo* may be awarded.

Error.

Venire de novo.

SARAH A. USRY v. M. H. SUIT and others.

Reference—Judgment—Variance—Pleading, defect of parties—Jurisdiction, sum demanded—Guardian and ward—Negotiable Paper—Statute of Limitations.

1. The facts found in a reference are conclusive, unless it should appear they were found without evidence or upon improper evidence.
2. As it nowhere appears in the record that the plaintiff, in her representative capacity as administratrix, was made a party, it was proper in the court below to refuse judgment affecting her as such.
3. No variance between allegation and proof is material unless it actually misleads the adverse party; *Hence* where plaintiff sues upon a bond, which by virtue of previous transactions was in the hands of one of the defendants, alleging the amount thereof to be \$550 or thereabouts," dated January 8th, 1860; and the bond produced in evidence by the defendant was for \$549, dated January 8th, 1860; *Held*, no variance.
4. An objection for defect of parties must be raised by proper pleading. THE CODE, § 242.
5. Where the sum demanded in good faith exceeds \$200, the superior court has jurisdiction.

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6. A bond made payable to a guardian is in equity the property of the ward, and suit may be brought upon it by the ward when the same was turned over in the guardian-settlement, notwithstanding the legal title may have been transferred by the guardian's endorsement to another.
7. Although, as to the endorsee in such case, the three year statute may bar his right of action on the bond, yet that lapse of time does not affect the right of action of the ward (to whom the bond belonged from the moment of its execution) which in this case accrued prior to August, 1868, and is governed by the statutes in force before that date.
8. In such case the right of action was not conferred by section 55 of the Code of Civil Procedure, but that statute simply enlarged the ward's remedy for enforcing a right of action already accrued at law as well as in equity.
- (*Barrett v. Henry*, 85 N. C., 321; *Hanner v. McAdoo*, 86 N. C., 370; *White v. Utley*, *Ib.*, 415; *Young v. Rollins*, 90 N. C., 125; *Worthy v. Shields*, *Ib.*, 192; *Gorman v. Bellamy*, 82 N. C., 496; *Brown v. Morris*, 83 N. C., 251; *Brickell v. Bell*, 84 N. C., 82; *Wiseman v. Witherow*, 90 N. C., 140, cited and approved.)

CIVIL ACTION, tried at Fall Term, 1883, of GRANVILLE Superior Court, before *MacRae, J.*

Defendants appealed.

Messrs. Batchelor & Devereux, for plaintiff.

Mr. M. V. Lanier, for defendants.

MERRIMON, J.—The material facts of this case are these: The plaintiff, whose maiden name was Suit, became of the age of twenty-one years on the 30th day of May, 1860. She intermarried with Samuel Usry on the 14th day of December, 1870, and he died intestate in the year 1874, and thereafter the plaintiff became his administratrix. Her brother, Robert S. Suit, became of the age of twenty-one years on the 7th day of April, 1863; and his sister Lucina C. Bennett, became of the age of twenty-one years on the 30th

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day of September, 1865, having intermarried with Charles W. Bennett on the 18th day of January, 1865.

In May of the year 1865, James R. Suit became the guardian of the persons above named (except the said Charles), then infants under the age of twenty-one years, and as such guardian, received for his said wards considerable sums of money and bonds for money.

On the 8th day of January, 1860, the defendants, M. H. Suit and E. F. Suit, executed to the said guardian for his said wards, their single bond for \$549.00, due one day from date; and on the 29th day of November, 1863, Robert S. Suit, having attained the age of twenty-one years, received from his guardian \$345.30, and this sum was on that day credited on said bond, the same having been paid by M. H. Suit, one of the obligors therein.

On the 22d day of April, 1867, the said guardian had a settlement with his said wards, in which he turned over to them jointly the bonds and funds that he held for them, and took from them a joint receipt; and among the bonds so turned over, was the said bond for \$549.00, with the credit mentioned, entered thereon, and this bond was their common property and so held by them; it went first into the hands of the said C. W. Bennett, husband of Lucina, named above, to whom it has been endorsed by the guardian; then into the hands of the plaintiff, and afterwards into the hands of the said Robert S. Suit, for himself, the plaintiff, and the said Lucina C. Bennett.

At the time of the settlement made between the said guardian and his said wards, the defendants, M. H. Suit and E. F. Suit, were present and subscribed the receipt mentioned as witnesses thereto. At the time of this settlement the interest of the plaintiff in the bond mentioned, it now appears, was \$124.43.

Some time after that settlement, without the knowledge or consent of the plaintiff, the said Robert S. Suit and

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Lucina C. Bennett, for some consideration moving them thereto, delivered and surrendered to the defendant M. H. Suit, one of the obligors therein, the said bond, and it has ever since been in his possession and by him defaced or mutilated; and the interest of the plaintiff therein has never been paid or discharged. At the time and before the said bond was so surrendered, the defendants, M. H. Suit and E. F. Suit, had notice and knowledge of the plaintiff's interest in it, and of how and for what purpose the said Robert S. held it.

The plaintiff brought this action on the 9th day of October, 1878, upon the bond mentioned, to recover so much thereof as was due to her, as indicated above. It seems that she was not accurately informed as to the exact sum of money mentioned in it, or as to the immediate consideration for which it was given.

In the complaint she described the bond sued upon thus: "That in addition to other moneys which came into the hands of said guardian, (meaning the guardian above mentioned,) was a bond executed jointly by the said M. H. Suit and E. F. Suit, conditioned for the payment of five hundred and fifty dollars (\$550.00), or *thereabouts*, part of the unpaid purchase money of said Sweny land, which said bond bears date of the 8th of January, 1860, with interest from date at the rate of six per cent. per annum."

It appears that the circumstances under which the bond was given and leading to its execution, were not accurately detailed in the complaint, but mediately it was given for part of the purchase money of "the Sweny land."

The defendants, in their answer, deny that they executed such bond as that alleged in the complaint, or gave any such bond to the said guardian, and explain, at great and unnecessary length, how they came to give the bond mentioned; they plead the statute of limitation, and they insist

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in their answer that the administrator of the deceased husband of the plaintiff is a necessary party to the action.

At spring term of 1881, the court made an order in these words: "By consent of parties, ordered that this action be referred to John W. Hays, as referee, under the Code of Civil Procedure."

At spring term of 1883, the referee made his report, finding the facts and law arising thereon, and likewise filing therewith the evidence taken by him. The defendants filed numerous exceptions to the report.

At the fall term of 1883 of the court, the action came on to be heard upon the report filed and the exceptions thereto. The court overruled all the exceptions, except the twelfth, and gave judgment for the plaintiff. The defendants excepted, and appealed to this court.

The order of reference was entered by consent and is very broad in its terms and effect. The whole action was referred by it, so that the referee had and exercised the powers both of the judge and the jury. He had authority to pass upon all the issues of fact and law. His findings in respect to the facts were conclusive, subject however, to the right of either party, on motion, to move the court to modify, set aside or confirm them. The consent of the parties, entered of record, is a sufficient consent in writing as allowed by THE CODE, § 420. This is an action at law, and this court has no authority to review or disturb the findings of the facts involved. *Barrett v. Henry*, 85 N. C., 321; *Hanner v. McAdoo*, 86 N. C., 370; *White v. Utley, Id.*, 415; *Young v. Rollins*, 90 N. C., 125; *Worthy v. Shields, Id.*, 192.

If, however, the referee found facts without evidence, or based his findings upon improper evidence, this would be error of law, that might be corrected in the superior court, and upon appeal in this court.

We cannot, therefore, pass upon the defendant's exceptions for alleged improper findings of fact, unless it shall

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appear that they were based upon no evidence, or improper evidence.

The exceptions are very numerous, and some of them are vague and indefinite, while others are substantially repetitions of one or more that precedes them in the order of number. It had been better to make them fewer in number, and state them with more care and precision. This would have greatly promoted the convenience of the counsel and court and helped us to reach a just and satisfactory conclusion.

We will endeavor to decide the material questions of law raised by the exceptions without regard to their exact order.

1. The defendants insisted that as the plaintiff was allowed by the referee to be made a party plaintiff as administratrix of her deceased husband, she should be required to give an undertaking for costs, she having been allowed to sue in her own right as a pauper. They likewise insisted that as the referee had found that the deceased husband in his life-time had no interest affected by the action, it should be dismissed as to her as administratrix, and that they should have judgment against her for costs.

The court properly overruled the exceptions in all these respects, because it does not appear from the report of the referee or anywhere in the record, that the administratrix of the deceased husband was made a party. No order for that purpose appears, nor does she as administratrix appear as a party plaintiff at any stage of the action. It is not sufficient that it was contemplated and determined to make the administratrix a party; she must have been made such, and this must appear of record. The court takes notice and jurisdiction only of parties to the record. And this court can only be governed by what appears with reasonable certainty in the record, whether reference be had to parties, or other material things therein, or that ought to be therein.

It seems that as the defendants suggested in their answer

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that the administratrix of the plaintiff's deceased husband ought to be made a party, the referee may have said she might be made such party, but upon finding, as he did, that the deceased husband in his life-time had no interest affected by this action, his administratrix would not be a proper party, she was not so made. The referee in a memorandum found in the evidence sent up, seems to refer to her as a party, and so does the court in passing upon one or two of the exceptions; but it nowhere appears that she was made a party, except by vague reference. This is not sufficient, and we are not called upon to decide a question not raised by the exceptions.

2. The defendants moved that judgment of non-suit be entered against the plaintiff, because of an alleged material and fatal variance between the bond alleged in the complaint as the ground of the action, and the bond produced and put in evidence by the defendant M. H. Suit, and which was surrendered to and defaced by him, and which was the bond upon which the plaintiff in fact founded her action. And upon the findings of the facts by the referee, the defendants moved in arrest of judgment for the same alleged variance. The court overruled these motions.

The bond sued upon was in the possession of one of the defendants; the plaintiff was not accurately informed as to the exact sum of money mentioned in it, or the precise considerations for which it was given; but under the circumstances, the allegations of the complaint described it as well as the plaintiff could. She alleged a bond for \$550, or "thereabouts," meaning about that sum, dated the 8th of January, 1860, with interest from date, and then alleged other facts and circumstances descriptive of and pointing to it; these were not all truly stated, but still they pointed to the bond in the possession of one of the defendants and the bond sued upon. The bond produced upon the trial by the defendant M. H. Suit, was for \$549, due one day from

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date, and dated the 8th day of January, 1860, so that the variance in fact consisted of one dollar, and this was cured by the description in other respects. The complaint plainly has reference to this bond, and in such way as to make the defendants sensible of the fact, and put them on their defense in respect thereto. Any question as to what interest the plaintiff had in it, does not arise in this connection—only the question of variance is here presented.

The present system of civil procedure looks to the substance of the pleadings and proofs, more than to mere matters of form. If the allegations in the pleadings, and the proofs offered in support of them, substantially harmonize, although they do not in immaterial respects or to an immaterial extent, there is no variance of which the law takes notice; if the substance of the allegation in its entire scope and meaning is proved, that is sufficient. THE CODE, §§ 269, 270 and 271, provides in plain and comprehensive terms that, "No variance between the allegation in a pleading and the proof shall be deemed material unless it has actually misled the adverse party, to his prejudice in maintaining his action upon the merits." If it is alleged that a party has been misled, that fact must be proved to the satisfaction of the court, and in what respect he has been misled, and the court may order the pleading to be amended. In case of immaterial variance—that is, a variance that does not substantially prejudice a party, the court may direct the fact to be found according to the evidence, or it may at once order an amendment without cost. The purpose of the statute is to enable the court to promptly reach and determine the merits of the matter in litigation, doing no party injustice, but cutting all parties off from shifts, subterfuges and technical quibbles by which to avoid the justice of the matter and the judgment of the law. *Gorman v. Bellamy*, 82 N. C., 496; *Brown v. Morris*, 83 N. C., 251.

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3. It was insisted that it appeared that the referee found that C. W. Bennett and his wife were necessary parties, and therefore, the action could not proceed without them. The referee in fact found that Robert S. Suit and Lucina C. Bennett, his sister, delivered the bond to the defendant M. H. Suit, and the defendants say in their answer that they "got in the said bond," meaning that they discharged it. It appears from the report in effect, if not in terms, that Lucina C. Bennett and her husband parted with their interest in the bond, directly or indirectly, to the defendants for some consideration that does not certainly appear. Besides, the objection was not raised by demurrer or the answer. THE CODE, § 242.

4. The defendant moved that the action be dismissed, because the principal sum found to be due the plaintiff was less than \$200, and therefore, the superior court had not jurisdiction. The court denied the motion, and we think, properly. The sum demanded was greater than \$200, and it did not manifestly appear that the sum due was less than that. It is the sum demanded in good faith that settles the jurisdiction in cases like this. *Brickell v. Bell*, 84 N. C., 82; *Wiseman v. Witherow*, 90 N. C., 140.

5. The exceptions 1, 6, 7, 8, 14 rest upon the alleged ground that there was no evidence to support the findings of the referee in respect to the matters mentioned therein. The court held that there was evidence upon which the referee might base his findings.

As we have said, we have no authority to reverse and correct the findings of the facts in cases like this, if there was any evidence to support them. The court below held that there was evidence. Upon a careful examination of the pleadings and the evidence sent up with the appeal, we concur with that court. There was plainly evidence arising legitimately in a variety of ways, that the referee might consider; some of it was conflicting, it is true; other portions of it seems to have been slight, but this goes to the weight

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and preponderance of the whole; it was the duty of the referee to determine that, and we have no authority to disturb his findings of the facts, nor are we at liberty to express any opinion in this respect.

6. The bond in question was executed on the 8th day of January, 1860, and due one day from date. A payment was made, and a credit entered thereon, on the 29th day of November, 1863, for \$845, and this is admitted by the defendants. On November 6th, 1866, it was endorsed to Charles W. Bennett without recourse, he being the husband of Lucina C., who was sister of the plaintiff and one of the wards of the guardian, James R. Suit, who so endorsed it. This action was begun on the 9th day of October, 1878.

It is manifest, that there was no statutory bar as to the obligee in the bond, nor was there any statutory presumption of payment as to him, because, under the statute the time between the 20th of May, 1861, and the 1st day of January, 1870, must be excluded, and after the latter date, the time can be counted only as if the payment endorsed on the bond had been made on that date, and less than ten years elapsed between that date and the date of the bringing of the action.

But the counsel for the defendants insisted on the argument, that under the statute the bond was a negotiable paper; that it was endorsed to Charles W. Bennett, and that, as to the endorsee, it was barred by the statute of limitation after three years.

This may be so ordinarily. But this case is peculiar, in that the bond was made payable to James R. Suit, the "guardian for S. A. Suit, R. Suit, L. E. Suit;" it belonged in equity to the wards, no matter in whom the legal title might rest; it was their property, and mere endorsement could not deprive them of it, as their property; they were entitled to every benefit and advantage secured by it; the guardian was their trustee, and when he turned the bond

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over to them in his settlement, they might have maintained an action upon it in their own names without regard to the legal title. THE CODE, § 177. The endorsement upon the bond was not made as to them, to enable them to sue the obligors; this they could do without endorsement, because the bond belonged to them from its inception.

It is admitted, that the obligee, the guardian, might have maintained an action on the bond—that he would not be barred by the statute of limitation, nor would there arise any presumption of payment as to him; but it is said that the wards to whom it so belonged, cannot do so because it was endorsed to the husband of one of them! This is an attenuated refinement, destructive of substantial right, and we cannot accept it as warranted by even a technical view of the statutes making bonds for money negotiable and limiting the time within which actions may be brought. If even the statute could be treated as a bar to the endorsee, under the [circumstances, this would not conclude the plaintiff, the real owner in part of the bond. The bond was in effect made to the wards, and they might maintain the action just as the nominal obligee might do. So that, we think the court properly overruled the exceptions to the report of the referee in respect to the statutes of limitation and presumption.

The learned counsel for the defendants further insisted in his argument, that as the plaintiff did not have the *legal* title to the bond, her right to sue upon it in her own name as the real owner in part of it, was conferred by C. C. P., § 55, (THE CODE, § 177,) and therefore her *right of action in her own name* accrued after the Code of Civil Procedure became operative, and the statute of limitation, C. C. P., §§ 31 and 34, in force in 1870, (repealed afterwards as to negotiable bonds,) barring actions on *negotiable bonds* after three years, applied to the right of action upon the bond sued upon, and barred the same.

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We cannot accept this interpretation of the several provisions of the C. C. P. referred to. It would practically defeat in great measure the saving purpose of C. C. P., § 16, (THE CODE, § 136,) which provides that actions commenced and *rights of action* accrued before the 24th day of August, 1868, shall be governed by the statutes in force next before that date. The bond was due in 1860, and her right of action accrued upon it, certainly after the settlement with her guardian on the 22d day of April, 1867. She could not, it is true, then sue *at law*, because the legal title was in another, but she could have had her remedy in equity at that time. Her right of action therefore accrued before the 24th day of August, 1868, and the statute of limitation invoked does not apply. The C. C. P., § 55, (THE CODE, § 177,) did not confer upon her the *right of action*; it only enabled her to enforce a right of action already accrued, *at law*, as well as in equity—it simply enlarged the remedy for enforcing her right of action.

The referee found in effect, that the bond sued upon had been paid and discharged, except as to the interest of the plaintiff therein; that as to her it had not been paid: that the statute of limitation was not a bar, and there was no statutory presumption of payment. If his findings of the facts were correct, (and with this we have nothing to do,) the plaintiff is entitled to recover. The technical rules of the common law method of procedure that required the owner of the legal title in such cases to bring the action, are all swept away by the Code of Civil Procedure. THE CODE, § 177, provides that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided," and this case is not otherwise provided for.

No error.

Affirmed.

RAMSAY v. RAILROAD.

J. T. RAMSAY v. RICHMOND & DANVILLE RAILROAD CO.

Corporations—Railroads.

The rule announced in *Stanly v. Railroad*, 89 N. C., 331, to the effect that in a suit against a railroad company it may be designated by its corporate name, affirmed.

(*Com'rs v. Magnin*, 78 N. C., 181; *Stanly v. Railroad*, 89 N. C., 331; *Phillips v. Railroad*, 78 N. C., 294, cited and approved.)

CIVIL ACTION for damages tried at Fall Term, 1883, of GASTON Superior Court, before *Gilmer, J.*

The plaintiff in his complaint alleges:

1. That the defendants (Richmond & Danville and Atlanta & Charlotte Air-Line) are railroad corporations owning and operating a railroad from Charlotte in this state to Atlanta in Georgia.

2. That, on November 10th, 1882, the defendants' train wilfully and negligently ran over and killed a mule belonging to him, that had strayed off and was upon the track of their road, without his fault, near Gastonia in this state, of the value of \$175, to recover damages for which the present suit is prosecuted.

The defendants demur to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, in that:

1. That the first allegation is vague and indefinite, and it does not appear therefrom by what authority the defendant corporations own and operate a road in North Carolina.

2. Nor does it appear that the defendants, or either of them, have any legal existence in this state or in Georgia.

3. Nor that the defendants have been chartered by the laws of North Carolina, or of any other state, nor whether the defendants are joint or several corporations, or have

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power and authority to operate together or singly, as owners, lessees or otherwise, the said road from one terminus to the other.

At the hearing the demurrer was overruled and judgment being rendered for the plaintiff, the defendants appealed.

Messrs. Battle & Mordecai and Hoke & Hoke, for plaintiff.

Messrs. G. F. Bason and Reade, Busbee & Busbee, for defendant.

SMITH, C. J. The right of the defendants at once to appeal from a judgment overruling a demurrer to the complaint is expressly declared in the case of the *Commissioners of Wake v. Magnin*, 78 N. C., 181, and has been repeatedly recognized and acted on since.

We think all the assigned causes of demurrer are insufficient under the ruling in a case to which much consideration was given, referred to in the argument for the plaintiff, by the authority of which we abide. *Stanly v. Railroad*, 89 N. C., 331.

The defence here set up, in substance, is the omission to aver an incorporation of the respective companies and authority conferred to operate a railroad in the state, or to state whether the defendants are associated companies or a single company.

But what difference can it make in respect to the plaintiff's right of recovery for his destroyed property, whether two companies are running the road in association or co-partnership or together constitute a single company? There is however no uncertainty on the point, for they are said in the complaint to be "Railroad Corporations," each being a corporation, and that they operate a road between the two designated terminal points. It is quite sufficient, if this averment be true, to subject them to the plaintiff's

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action for the consequences of their negligent action. There is no reason why companies under separate management may not so unite in running a road as to make both responsible for a wrongful act. *Phillips v. Railroad*, 78 N. C., 294. The demurrer was therefor properly overruled and the plaintiff allowed to proceed with the action.

We mean simply to affirm the judgment rendered upon the demurrer which is the only point presented in the appeal and the cause will thence proceed without regard to the subsequent words, "judgment for plaintiff," which if they have any significance must be understood as having reference to that overruling the demurrer according to the provisions of the Code of Civil Procedure, § 272.

There is no error. Let this be certified to the superior court of Gaston county.

No error.

Affirmed.

J. M. BAILEY v. A. J. RUTJES.

Appeal.

Motion to dismiss appeal will be allowed where there is no waiver of the undertaking and no money deposit in lieu thereof, and where the bond is not justified in double the amount specified therein.

(*Harshaw v. McDowell*, 89 N. C., 181, cited and approved.)

MOTION by plaintiff to dismiss an appeal, heard at October Term, 1884, of THE SUPREME COURT.

Messrs. Sinclair and Batchelor & Devereux, for plaintiff.

Messrs. Folk and Reade, Busbee & Busbee, for defendant.

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MERRIMON, J. It does not appear by the record or otherwise in writing, that an undertaking upon appeal was waived by the appellant, or that a sum of money in lieu of such undertaking was deposited with the clerk by order of the court. It does appear, however, that an undertaking was given, but it was not properly justified by a surety thereto. He fails to make affidavit in connection therewith, "that he is worth *double* the amount specified therein."

The appellee, for the causes mentioned, moved to dismiss the appeal. It is obvious that he is entitled to have his motion allowed. In the absence of an undertaking duly justified, the appeal has "no effect." THE CODE, § 560; *Harshaw v. McDowell*, 89 N. C., 181.

Motion allowed.

 KENNER & GREENFIELD v. LEXINGTON MANUFACTURING COMPANY.

Corporations, suit upon note executed by president of—Pleading—Verdict.

1. A corporation was sued upon a note executed by its president, and the recovery was resisted upon the ground that under its by-laws the president had no power to bind the company without the concurrence of three of its directors, (which was not given) and upon the trial a verdict was rendered establishing the fact the company borrowed the money and used it in its business and executed the note sued on; *Held*, that the defendant is concluded by the verdict.
2. *Held further*, that where the defendant company relies as a defence upon the statute, which declares that such contract shall be

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in writing, and shall state whether the stockholders are individually liable for the contracts of the company (Bat. Rev., ch. 26, § 23), the same must be pleaded in proper form, otherwise it will not be considered.

3. A verdict adverse to the defences set up leaves nothing to be done except to render judgment for the plaintiff. The case does not stand as upon demurrer or a motion in arrest of judgment.

(*Lyon v. Crissman*, 2 Dev. & Bat. Eq., 268; *Bonham v. Craig*, 80 N. C., 224, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1884, of FORSYTH Superior Court, before *Gilmer, J.*

Judgment for plaintiffs; appeal by defendant.

Messrs. Watson & Glenn, for plaintiffs.

Mr. J. M. McCorkle, for defendant.

SMITH, C. J. The defendant, a company organized and acting under the laws of this state, on the 10th day of January, 1882, borrowed and received from the plaintiffs who constitute the partnership firm of Kenner & Greenfield, in which capacity they sue, the sum of two thousand dollars and executed its note therefor payable one day after date and bearing interest at the rate of 8 per cent. per annum.

The action is to recover the amount due, and the complaint sets out two causes of action, one founded upon the security given and the other upon the lending and use of the money by the defendant in prosecuting its business. The answer denies all the plaintiffs' allegations, except that averring the defendant to be a corporate body, and sets up a defence arising under the by-laws, one of which declares that no loan, either permanent or temporary, shall be made by the president or any other officer of the company unless authorized and directed, with the consent of three members of the board of directors.

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Two issues were submitted to the jury, to each of which an affirmative answer was returned as follows :

1. Did the defendant corporation execute the note as claimed by the plaintiffs ?

2. Did the defendant borrow from the plaintiffs, and receive and use in its business the sum of two thousand dollars, as claimed by the plaintiffs.

Testimony was introduced on the trial as to the condition of the company and its impaired credit, which prevented a borrowing of any money for its relief at several financial points, when application was made without success, with concurrence of all the directors, but the assent of only two was given to this particular loan, the others being absent, previous to its being effected, though it was ratified at a meeting of the board in the next month, all but one being present and giving assent. Some testimony was offered in opposition to that given by the plaintiffs' witness as to a subsequent ratification.

While the argument of plaintiffs' counsel was in progress, he was interrupted by defendant's counsel who consented that the jury might render an affirmative response to the inquiries before them. This was accordingly done and the verdict entered, whereupon defendant's counsel moved for judgment against the plaintiffs notwithstanding the findings by the jury :—

1. For that upon the whole evidence the plaintiffs cannot recover.

2. The plaintiffs had no authority to take the note and it is inoperative as a security.

3. That although the plaintiffs loaned the money as alleged, it constitutes no legal cause of action.

4. That the ratification afterwards of the act of giving the note, or of using the money lent, does not render the contract obligatory on the defendant.

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The defence, and the only defence, set up in the answer to defeat the action, is the want of power in the president, under the by-law mentioned, to enter into the contract and bind the company without the concurrence of three of the directors, which was not given at or before the borrowing. This objection is removed by the verdict rendered by consent which establishes the fact that the corporation did borrow, receive and use the money in its business, and did execute its note therefor as stated in the complaint. To this finding the counsel for the plaintiffs ascribes the further effect of declaring it to constitute an obligation, since in law this results from the finding that the company did contract; and contracting is entering into the obligation which is expressed. Hence it is agreed that all further resistance to the recovery is put an end to, and the defendant concluded by the verdict.

The appellant insists, however, that only the allegations in the complaint are found to be true, and the case now stands, as upon a demurrer, or a motion in arrest of judgment, and that upon the face of the complaint the action cannot be maintained. In support of this contention it relies upon the act of February 12th, 1872, which declares that:

Every contract of every corporation by which a liability may be incurred by the company exceeding one hundred dollars shall be in writing, and either under the common seal of the corporation, or signed by some officer of the company authorized thereto, and shall state on the face thereof whether or not, according to the registered plan of incorporation, the stockholders are individually liable for the contracts of the company, otherwise the same shall be void. Bat. Rev., ch. 26, § 23.

Is the defence arising under this enactment now open and available to the company?

The statute of frauds in positive terms declares that all

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contracts to sell or convey any lands, tenements or hereditaments, &c., *shall be void* and of no effect, unless such contract or some memorandum or note thereof shall be put in writing, &c., THE CODE, § 1550, and yet it was held in *Lyon v. Crissman*, 2 Dev. & Bat. Eq., 268, that the objection that the agreement was not in writing "should have been set up in the pleadings" and as it had not been done, it could not be taken at the hearing.

So in *Bonham v. Craig*, 80 N. C., 224, it was declared, to deny the contract in general terms was sufficient, and then any other than proof in writing of the contract would be excluded, for none could be created by parol. The principle is that this is a defence to the action and must, in some proper form, be set up to defeat it; otherwise it will not be considered.

It is true that the closing paragraph in the first article of the answer avers "that said pretended bond," as set forth in the complaint, "is in no way obligatory upon the defendant," but the preceding allegations all point to the repugnancy of the note to the corporate by-law as affecting its validity and to no other infirmity in the instrument rendering it inoperative, and what we have quoted is but a summary conclusion deduced from preceding allegations.

From what has been said, it follows that the verdict overruling the defences set up in opposition to the plaintiffs' demand, leaves nothing further to be done except to render judgment therefor, as was done by the court. Certainly a general verdict under the former practice would have this effect, and why should not the same effect follow a finding adverse to all the alleged defences under our present system? We must therefore affirm the judgment.

No error.

Affirmed.

SETZER v. DOUGLASS.

G. W. SETZER v. R. M. DOUGLASS.

Removal of Causes—Jurisdiction.

An action for a breach of a contract entered into between a United States marshal and his deputy, by which the former agreed to pay the latter a certain portion of fees received, is cognizable in the state court, and it was error in the judge to remove the same to the federal court for trial. The action is to enforce an alleged individual obligation, and does not come within the scope of the statutes in reference to removal of causes.

MOTION to remove a cause heard at Fall Term, 1884, of CATAWBA Superior Court, before *Gilmer, J.*

The defendant filed his petition to remove the case to the circuit court of the United States at Greensboro, for trial. His Honor granted the prayer and the plaintiff appealed.

Mr. M. L. McCorkle, for plaintiff.

No counsel for defendant.

SMITH, C. J. The cause of action stated in the complaint arises out of an alleged breach of contract entered into between the parties under which the defendant, then being marshal of the United States for the western district of North Carolina, appointed the plaintiff his deputy and agreed to pay him a certain portion of the fees earned in the service of the latter when received by the former, stated to be three-fourths of the aggregate amount. The gravamen of the complaint is the defendant's refusal to account for and pay over the portion claimed by the plaintiff.

The answer admits the appointment and the rendition of service under contract, but avers that the defendant agreed to pay over to the plaintiff not two-thirds of the sum, but one-half only, when received by the defendant, after being

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passed on and allowed by the proper authorities of the government, and the obligation of the defendant was contingent upon the allowance; that some of the charges have been approved and others as yet not acted on, and that when the plaintiff is charged with what he has received and has improperly retained, there will be found nothing due him.

After the pleadings were put in and at the next fall term, 1884, of the superior court of Catawba, the defendant made application for the removal of the cause, gave bond and filed his petition, wherein, among other allegations not necessary to be noticed, he says that he was marshal of the United States for said district and that the services for which compensation is demanded, were rendered by the plaintiff as his deputy and are official, and that the plaintiff became entitled therefor to a rate of remuneration not exceeding two-thirds of the amount of the charges when passed on and approved by the attorney general and paid over to the petitioner, and that the defendant's liability, if it exists for any unpaid residue, is entirely official and contingent.

The application was granted and the following judgment rendered:

"On the pleadings and proceedings in the above entitled action, and on the petition and bond filed herein by the defendant under the statutes of the United States, and on motion of the attorney for defendant, it is ordered that the security offered by defendant, be accepted and said bond approved, and that the state court proceed no further in this cause, and the cause be removed into the United States circuit court at Greensboro in the western district of North Carolina."

From this judgment the plaintiff's appeal brings up its correctness for review.

The statute upon which this ruling is based is not specifically pointed out, and we have had no argument upon the hearing in support of the action of the court in suspending

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further proceedings and transferring the cause to a federal jurisdiction.

The enactment found in section 643 of the Revised Statutes of the United States, commented on in the argument for the appellant, furnishes no support to the order, for this statute only provides for the removal of a civil suit or criminal prosecution instituted in a state court "against an officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, or on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law."

The statute is intended, so far as we have recited its language (and the residue of it applies to matters connected with the exercise of the elective franchise) to protect persons engaged in the enforcement of the revenue laws from interference by suits commenced in the state courts while in discharge of official duty, and does not extend to the present case.

Nor do we find any support afforded to the order in the act of March 3rd, 1875. In this the removal may be made in cases when the matter in dispute in the suit arises "under the constitution or laws of the United States or treaties made or which shall be made under their authority." Sup. Rev. Stat. U. S., ch. 137, § 2.

Or where the title to land is in controversy in a suit between citizens of the same state, and one or more of the plaintiffs or defendants shall state to the court, or on affidavit if required, that "he or they claim and shall rely upon a right or title to the land under a grant from the state," and it shall be ascertained in the mode therein prescribed that the adversary party claims under a grant from some other state, § 3.

The present action comes within the scope of none of these statutory provisions, for the controversy is not with

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those employed in executing the revenue law, nor does it question any right or claim under the constitution, laws or treaties of the general government, nor does it obstruct or impede any officer or person engaged in executing the laws of the United States.

The action rests upon contract and is entirely personal to the defendant, as much so as if he were not an officer of the United States when he made it. It is to enforce this individual obligation and to compel payment to the plaintiff of his share of the *moneys* when and not before they are received by the defendant and are at his absolute disposal. It does not propose to interfere with the supervisory power reposed in the higher authorities to pass upon the charges made by its subordinate officers and agents. There is no reason why the defendant should not be held liable for a violated voluntary agreement of his, if indeed there has been any violation, as much as any other person who may have subjected himself to an action.

The suit must, in part at least, remarks WAITE, C. J., in *Gold Wash. & Water Co. v. Keyes*, 96 U. S. Rep., 199, arise out of a controversy between the parties in regard to the operation and effect of the constitution or laws upon the facts involved.

The previous adjudications cited in the opinion sustain this construction, and, as the words of Chief Justice MARSHALL used in deciding *Cohens v. Virginia*, 6 Wheat., 379, "a case may be truly said to arise under the constitution or a law of the United States whenever its correct decision depends upon either," or "where the right or title set up by the party may be defeated by one construction of the constitution or law of the United States or sustained by the opposite construction." *Osborne v. Bank of United States*, 9 Wheat., 822.

The more recent case of *Albright v. Teas*, 106 U. S. Rep.,

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613, is, in its essential features and in principle, that before us.

It is clear, says Mr. Justice Woods, from an inspection of the bill and answers (it was a suit in equity), that the case is founded upon an agreement in writing between the appellee and the appellants, Albright and Clairborn, by which the former for a consideration therein specified transferred to the latter his interest in certain letters patent. The suit was brought to recover the consideration for this transfer, and was not based on the letters patent.

The cause had been removed from a state to the circuit court of the United States, and was remanded. This ruling was affirmed by the supreme court.

We are therefore clearly of opinion that there is error in the refusal to proceed in the superior court, and the order of removal and the ruling are reversed. This will be certified to the end that the cause may proceed in the court below.

Error.

Reversed.

In HILDEBRAND v. DOUGLASS, from Catawba:

SMITH, C. J. This case is essentially the same as that of *Setzer v. Douglass*, and for the reasons given in the opinion in that case, which are equally applicable here, the ruling in the court below must be reversed, and the court directed to proceed in the cause. Let this be certified to the superior court of Catawba.

Error.

Reversed.

PENNIMAN v. DANIEL.

N. G. PENNIMAN v. JOHN H. DANIEL.

Attachment—Discontinuance—Appeal.

1. In attachment proceedings, where an appeal is taken and the decision may dispose of the case altogether, it is discretionary in the court below to proceed upon matter collateral to the main purpose during the pendency of the appeal; hence a motion to dismiss the action upon the ground that the plaintiff's failure to proceed and make the defendant a party by publication, before the appeal was determined, worked a discontinuance, was properly overruled.
2. Effect of an appeal upon matter included in the action and not affected by the judgment appealed from, discussed by SMITH, C. J.
3. A discontinuance results from the voluntary act of the plaintiff in not proceeding regularly with the case by the issue of the successive connecting processes.
4. *Quere*—Whether an attachment prosecuted, on notice by publication of the seizure of the debtor's property, to final judgment, is a proceeding *in rem* or *in personam* under the present law.

(*Brown v. Hawkins*, 68 N. C., 444; *Mabry v. Henry*, 83 N. C., 298; *Etheridge v. Woodley*, 83 N. C., 11; *Skinner v. Moore*, 2 Dev. & Bat., 138; *Peebles v. Patapsco*, 77 N. C., 233, cited and approved.)

MOTION heard at Fall Term, 1884, of CATAWBA Superior Court, before *Gilmer, J.*

Under the warrant of attachment issued at the same time with the summons on March 14th, 1883, certain personal and real property of the defendant was seized and taken into possession by the sheriff, and while so held the defendant's counsel under a power of attorney from him, appearing for a special purpose only and to make the motion, moved the clerk to vacate the attachment and the order for its issue for reasons assigned in a written application. The motion being allowed, the plaintiff appealed to the judge

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who at the return term of the process affirmed the ruling of the clerk. At the same term the defendant's counsel also moved to dismiss the action, which was refused upon the ground that he had not become a party to the suit. From the judgment annulling the attachment, the plaintiff by appeal removed the ruling to this court, when at February term last it was reversed. (90 N. C., 154). At fall term, to which the judgment of this court was certified, the counsel again entered a special appearance and in open court, and moved:

1. That the action be dismissed upon the ground that the failure of the defendant to proceed while the matter of appeal was depending in the supreme court had worked a discontinuance.

2. That the attachment be vacated, there having been no service of process or publication of the summons or warrant as required by law, and for insufficiency in the affidavit on which the attachment issued.

These motions were denied and an order made in these words:

It appearing to the satisfaction of the court that a summons has issued against the defendant, and that after due diligence the defendant cannot be found in this state, and that an attachment has been taken out against the property of the defendant in this county, and that a cause of action exists against the defendant, it is ordered by the court that publication be made, &c.

Exceptions were taken by the defendant to the denial of his motions to dismiss and vacate, and to the order of publication, and from the rulings thereon he appealed.

Mr. M. L. McCorkle, for plaintiff.

Messrs. L. L. Witherspoon and *G. N. Folk*, for defendant.

SMITH, C. J., after stating the above. We do not propose to

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consider any imputed defects, real or supposed, in the affidavit made to obtain the warrant of attachment, since its sufficiency in form has been passed on and established in the former appeal, when this was the only point presented.

Any objections to which it may be obnoxious should then have been made, and these as well as that then considered are concluded by the judgment.

The decision first made, during the subsequent progress of the cause, must be regarded, in the words of BOYDEN, J., "as final and conclusive, at least so far as regards the facts that existed at the time of that decision." *Brown v. Hawkins*, 68 N. C., 444. To the same effect is *Mabry v. Henry*, 83 N. C., 298.

2. The other proposition, pressed with more force and with a large array of authority, is that the plaintiff in failing to proceed by publication to make the defendant a party, during the pendency of his appeal in this court, has worked a discontinuance of process, and as a new action must be begun by summons, and the summons must precede or accompany the issue of the warrant of attachment, he cannot now proceed. Involved in this contention is the question as to the effect of the appeal in suspending or dispensing with the necessity of taking intermediate steps to facilitate the hearing of the cause upon its merits, until the result in the appellate court is certified to the superior court from which the appeal comes.

The statute, to which our attention is called, provides that where an appeal is perfected, "it stays all further proceedings in the court below, upon the judgment appealed from, or upon the matter embraced therein, but the court below may proceed upon any other matter included in the action and not effected by the judgment appealed from. THE CODE, § 558.

It will be observed that the statute does not require the action to proceed when the appeal is from some interlocu-

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tory order, or the ruling upon matter collateral and subsidiary to its main purpose, but leaves to the appellant the right to do so, while it peremptorily arrests any further action in the court below involved in the subject matter of the appeal. Its language is, the court "*may proceed upon any other matter,*" or, as we interpret it, the court may forbear and await the decision on the appeal, leaving it discretionary in the court to do so, where the law involved and to be passed on lies at the foundation of the action and may dispose of it altogether.

In the present case, had the decision dissolving the attachment been sustained, it would have put an end to the cause unless personal service could be made, changing the character of the suit; or other property, unless that levied on remained accessible to the writ, could be found to be seized. It was reasonable therefore to allow the cause to remain without further action until the determination of the appeal was judicially made known to the judge of the superior court, and this was the course pursued in the present case.

A discontinuance results from the voluntary act of the plaintiff in not going on regularly by the issue of successive connecting processes, and thereby producing a break or hiatus to which such effect is ascribed. The cases cited for the appellee are numerous on this point, and will be found in *Etheridge v. Woodley*, 83 N. C., 11, and all show the plaintiff's failure to follow up his suit after it was begun.

In *Pennoyer v. Neff*, 95 U. S. Rep., 714, decided in 1877, with but a single dissenting voice, the conclusion reached and announced is that a judgment recovered in a suit by attachment levied upon the defendant's land when no personal service has been made, is exhausted by a sale of the property attached and the appropriation of the proceeds to the creditor's debt, and possesses no other legal force. The sale of other land of the debtor under such judgment was held to pass no title to the plaintiff. If this be accepted as

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the law in this state, it shows that the preservation of the lien of the attachment was a fundamental condition of success, and might well excuse the waiting until the validity of the warrant was determined.

We do not undertake to say that such is the law in this state, and certainly this decision is at variance with the adjudications under the former law. It has been held that a proceeding commenced by original attachment and prosecuted on due notice by publication of the seizure of the debtor's property to final judgment, was not a proceeding *in rem*, but the judgment is personal. *Skinner v. Moore*, 2 Dev. & Bat., 138.

The attachment was in its nature and operated as a distress to compel appearance; and if it did not, the judgment was absolute and conclusive as if rendered after personal service.

The attachment under THE CODE, is of quite a different nature and subsidiary only towards the obtaining the relief which is the object of the action, and seems under the statute to be intended to be more comprehensive and more fully remedial within the state than is admitted in the opinion in *Pennoyer v. Neff*.

As to the extra-territorial effect of such a judgment, it can be only recognized as effectual so far as it appropriates the debtor's property to the creditor's demand, and wholly inoperative beyond that limit, and so it is held in *Peebles v. Patapsco*, 77 N. C., 233.

It is unnecessary to proceed with the further examination of the subject, as in our opinion the delay of the plaintiff pending the appeal which he was prosecuting is not a discontinuance or abandonment of the action, and there was no error in allowing him to proceed and make the required publication. There is no error in the ruling and this will be certified to the superior court of Catawba, to the end that the cause proceed.

No error.

Affirmed.

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W. B. FRY v. D. A. B. CURRIE and others.

Guardian and Ward—Ejectment—Verdict—Evidence—Judge's Charge.

1. The law applicable to this case did not require actual service of process upon infant defendants: it was sufficient, if served upon the guardian *ad litem*; and there is no defect in the proceedings resulting in a sale of the land of the infants.
 2. In ejectment, where it is alleged that the jury gave undue weight to evidence they were directed not to consider in fixing a disputed boundary, the complaining party must seek his remedy in a motion for a new trial addressed to the discretion of the presiding judge. An assignment of error upon such ground will not be entertained here. The court intimate that in this case the excluded evidence (declaration of grantor in a deed) is competent in aid of location of boundary of a tract of land adjoining the grantor's.
 3. The surveyor's testimony and the declarations of the aged persons, since deceased, bearing upon the location, were properly left to the jury, who alone must determine the value of the evidence as tending to show the true position of the land in dispute. The court can not coerce them to find a fact upon evidence they disbelieve.
 4. An omission to give a charge to which a party would have been entitled is not error, unless the same was requested on the trial and refused. THE CODE, § 412, construed.
- (*White v. Albertson*, 3 Dev., 241; *Mattheus v. Joyce*, 85 N. C., 258; *Raiford v. Peden*, 10 Ired., 466; *Bonner v. Tier*, 3 Dev., 353; *Roberson v. Wollard*, 6 Ired., 90; *Mason v. McCormick*, 85 N. C., 226; *Sasser v. Herring*, 3 Dev., 340; *Noland v. McCracken*, 1 Dev. & Bat., 594, cited and approved.)

EJECTMENT tried at Fall Term, 1883, of MOORE Superior Court, before *McKoy, J.*

Defendants appealed.

Messrs. McIver & Black, Guthrie and Murchison, for plaintiff.

Messrs. John Manning and Hinsdale & Devereux, for defendants.

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SMITH, C. J. The plaintiff claims the land described in his complaint under a grant from the state issued for 100 acres to Thomas Bryant on November 30th, 1820, and successive conveyances from him and others, terminating in a deed made by the sheriff of Moore in the year 1841 to the plaintiff, pursuant to a sale under execution against the heirs at law of John Ray, the last bargainee in the series.

The defendant objected to the introduction of this deed as evidence, which objection has since been waived, to the sufficiency of its description of the land and to the efficacy of the judicial proceedings which preceded and led to the sale, in divesting the estate of the intestate, John Ray, therein.

The most prominent among the exceptions to the adverse rulings of the court in reference to the action against the heirs, of whom there were two in number, all under age, to subject the descended lands to the debts of their ancestor, is to the sufficiency of the service of process upon their guardian *ad litem*, without actual service of the *scire facias* upon them.

After the repeated adjudications against the force of a similar objection to a practice which has long prevailed and upon the validity of which so many titles depend, and especially, taken by one not interested in the judgment, and in a proceeding wholly collateral, the law must be considered settled upon the point. We are content to refer to but two cases. *White v. Albertson*, 3 Dev., 241; *Matthews v. Joyce*, 85 N. C., 258.

Nor is the sheriff's sale ineffectual by reason of any of the other defects in the proceedings pointed out in the other exceptions. Indeed they are unusually full and specific. There is a judgment against the administrator ascertaining the debt; the value of the assets in his hands and its insufficiency to discharge the judgment by more than one hundred dollars, besides costs; the appointment of a guardian

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ad litem to the heirs of the intestate designated by name; the award of the writ of *scire facias* against them; the service upon the guardian *ad litem*; the adjudication of sale; the issue of execution after twelve months delay, reciting the previous action of the court and directing the sheriff to sell "all lands which descended to the heirs of John Ray, deceased, situate in his county, for the residue of the debt above the value of the ascertained assets and costs, which had been adjudged to Thomas Bryant for debt and \$6.05 for costs and charges in said suit expended, wherefore Majory Ann Eliza and John Alex Ray, heirs at law of John Ray, deceased, are liable as appears to us of record."

The sheriff made return to this execution and executed his deed to the plaintiff with full recitals of the action of the court and his own proceedings under the writ, conveying the tracts of land sold and describing them by metes and bounds.

We are unable to discover any defect in these proceedings, obstructing the transfer of the title to the intestate's lands which, at his death, vested in the said heirs, to the plaintiff who made the purchase.

The case of *Raiford v. Peden*, 10 Ired., 466, is not in conflict but rather supports this conclusion, nor are those of *Bonner v. Tier*, 3 Dev., 353, and *Roberson v. Wollard*, 6 Ired., 90, since the heirs are named in the execution.

2. The appellant's next exception is to the admission in evidence of a deed from Alexander McIntosh to George Graham, made on August 22nd, 1821, as incompetent to aid in locating the land granted in the year before to Thomas Bryant, because it is of posterior date.

This exception was sustained, the court holding that it could not be used for that purpose and so charged the jury according to the appellant's prayer.

We cannot see how an exception can lie to this ruling, made at the defendant's request and in most explicit terms.

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We must assume that the jury acted in accordance with this instruction, and if it can be supposed they did not, the remedy must be sought in the application for a new trial addressed to the discretion of the presiding judge. We cannot entertain an assignment of error in that the jury may have been influenced in arriving at a verdict, by giving weight to evidence they were expressly directed not to consider, in fixing the boundaries of the Bryant grant.

But it is not so clear that the deed executed by McIntosh to Graham was not admissible to aid in fixing the beginning of the boundary of the Bryant tract which is, or is supposed to be by the calls of the grant, at "McIntosh's corner." His deed is an assertion of ownership of the land defined in it and is his declaration of the location of its lines and corners, used by a contiguous proprietor to determine the place of a corner common to both. Would not his declarations made when alive, be competent, as hearsay, not to locate his own, but the boundary of an adjacent tract that calls for and touches it? The evidence does not come from an interested party to subserve some purpose and to secure some advantage to himself, but it is a concession in disparagement of his claim to a wider boundary for his own land.

In *Mason v. McCormick*, 85 N. C., 226, where such declarations were received and held to be competent, it is said they are "not used to ascertain and fix the limits of the defendant's own land, but the corner of an adjoining tract, to determine its location, and the evidence is not rendered inadmissible because that corner is coincident with one of his own boundaries."

Such declaration when found in deeds, stands very much upon the footing of an oral utterance to the same effect from one who is dead. *Sasser v. Herring*, 3 Dev., 340, and other cases cited in the opinion.

But it is not necessary to determine the point since the

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ruling was unfavorable to the plaintiff who does not complain, and the defendant cannot.

In order to cover the disputed land with an older title and displace the plaintiff's claim, the defendant exhibited a grant made on May 17th, 1795, to David Allison, and, to fix the location of the land it conveys, proved numerous declarations of old persons since deceased, as to the position of the beginning corner, and showed that its lines from that point run according to the defendant's contention would enclose the part in controversy.

A copy of the grant is not found in the transcript but it is stated that it calls for the "Lewis land," and the "Black land," both of which adjoin.

Starting at the corner understood to be designated by the evidence and marked 42 on the map, and running thence in conformity with the provisions of the grant, the surveyor says "he did not think he made any real connection with the Lewis land or the Black line called for—Lewis line at 6 and the Black corner at 11," though he did not run the lines of either of those tracts.

This dislocation of the Allison land from tracts which form part of its boundary throws some discredit upon the declarations relied on to locate its first corner; for if it be where they place it, the survey should not avoid but come up to the lines thus called for; and that they do not afford evidence against the correctness of the location. But to what extent this fact, assuming it to be a fact, impairs confidence in the statements of these aged men, as to the true position of the corner in space without the presence of a natural object to which they are annexed, it belongs to the jury alone to determine.

The defendant submitted several instructions to be given to the jury, of which we only notice such as were refused:

1. If the jury believe that Kenneth Black and the other aged men pointed out the corner of the Allison grant as

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being at 42 or A, according to the testimony of the witness, Currie, then they must answer "yes" to the inquiry propounded in the 4th issue:—Does the Allison grant cover the land in dispute?

The instruction assumes the absolute truth of the location, if in fact the declarations were made and are correctly remembered and reported, and denies to the jury the right to judge of its credit and sufficiency to establish the position of the corner. It makes that which is evidence only, and not always most satisfactory evidence, proof of the fact which it tends to support, and not only places hearsay, words not spoken under oath, upon a higher plane than sworn testimony delivered with opportunities for cross-examination, but withholds from the jury an essential function to be exercised in the administration of justice, in passing upon the means of information, the accuracy of memory and the truthfulness of those who undertake to fix a corner in space without the sustaining presence of some natural object with which recollection may correct itself. In brief, the court is requested to tell the jury they *must accept* the location, as ascertained by these declarations and regard the declarations as entitled to absolute and unquestioning credit.

It was for the jury, not the court, to determine the value of the evidence and its force in proving the fact for which it was introduced, and there was here the repugnant fact, if the surveyor's impressions were correct, that the lines of two adjacent tracts which form part of the boundary of the Allison tract as described in the grant, are not reached by a running that makes that corner a starting point. It would have been a usurpation in the judge to deny to the jury the right to say what credit ought to be given to the declarations as tending to show its true position under the grant.

2. After verdict the defendant moved for a new trial not

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only on the ground of the several overruled exceptions, set out in the record, but for the further reason because the jury's response to the issue in reference to the Allison land was against the evidence and without evidence.

We cannot precisely understand the force of this assigned ground for a *venire de novo* as a matter of right. The jury have not found any positive fact without evidence which would be an error in law. They have simply failed to find a fact upon the evidence introduced to prove it. How can the court control the jury and force them to give credit to testimony, without an invasion of their functions? The result only shows that the declarations of the old men did not satisfy them that the corner was where these old men supposed it to be. The finding belongs exclusively to the jury and no court can coerce them to find a fact upon evidence which they disbelieve, however cogent and convincing it may appear to others. *Ad questiones facti, non respondent iudices; ad questiones legis, non respondent juratores*, is a maxim necessary to be maintained in judicial administration.

In *Noland v. McCracken*, 1 Dev. & Bat., 594, the jury had been directed in language not very unlike the proposition now maintained for the appellant, that "where a witness was heard by a jury, who was neither impeached, nor contradicted, whose story was credible, and in whose manner there was nothing to shake confidence, they were bound to believe him." This instruction was declared erroneous and GASTON, J., in his opinion says: "They (the jurors) are the competent and exclusive judges whether human testimony be inconsistent with the operation of those common principles which regulate human conduct. If thus believing, they do in their consciences actually assent to it, there is no rule of law which compels them to yield to it an official faith. While the competency of witnesses and the relevancy of testimony are made the exclusive subjects of judi-

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cial cognizance, the *credit of witnesses and the sufficiency of their testimony are as exclusively matters for the determination of the jury.*"

This is emphatically enforced in the statute which forbids a judge to "give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury." THE CODE, § 413, and numerous references under the section.

It has been urged that there was no evidence to support the plaintiff's location of the land described in the Bryant grant.

In answer to this objection it may be said that it was not made at the trial, and the adjudications are too numerous and uniform to need repetition, that error cannot be first assigned in this court for an omission in the trying judge to give a charge when not requested to give it.

Nor is this rule of practice at all modified by that prescribed in THE CODE, § 412, Par. 3, which declares:

"If there be error either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same shall be deemed excepted to without the filing of any formal objections."

It is obvious that an omission to give a charge to which a party would have been entitled will not be a reviewable error unless requested and refused.

And it is equally manifest that the expression "in his instructions generally" is meant to embrace such instructions as involve an erroneous statement of the law. When the judge undertakes to lay down the law he must lay it down correctly, that is, the legal proposition must be in itself correct.

It is becoming so common for counsel to criticise instructions, not for an inherent and apparent error, but for an alleged error in its relations to the evidence, that we deem it proper to announce that we can consider only exceptions

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made in the court below, and under the statute such as are included in its terms. It would do great injustice to the judge to have his rulings revised when no exception was taken at the time, or to have reversed on appeal instructions other than such as contain an erroneous proposition of law; and beyond this in our opinion it was not the intention of the general assembly to go in putting the enactment in its present form.

Upon a calm review of the whole case we must declare there is no error in the record, and the judgment must be affirmed.

No error.

Affirmed.

JOSEPH A. DAVIS v. T. A. LYON and others.

Libel—Evidence—Judge's Charge.

Upon trial of an action for libel, it appeared that the libelous matter was contained in a newspaper and was, in substance, that the plaintiff, a justice of the peace, issued a warrant for the arrest of one D., charging him with an assault with intent to commit rape, and "after his style of dispensing justice converts the case into an assault and battery, and discharges the offender upon payment of costs, which was \$30," and that the plaintiff's purpose was to secure his fees; otherwise the offender would have been bound over to court; and the defendant pleads justification; *Held,*

(1) Evidence that plaintiff retained moneys in other cases disposed of by him (which belonged to the school fund) in the exercise of his judicial functions, is admissible to show his habitual abuse of authority for private gain. upon plea of justification of charge imputed to plaintiff.

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(3) The charge of the court that plaintiff had no jurisdiction to try such case, other than to bind over after a preliminary examination into the facts, was not erroneous.

(*State v. Lyon*, 89 N. C., 568; *Sharpe v. Stephenson*, 12 Ired., 348; *Walters v. Smoot*, 11 Ired., 315, cited and approved.)

CIVIL ACTION for libel, tried at July Special Term, 1884, of GUILFORD Superior Court, before *Graves, J.*

Judgment for defendants, from which plaintiff appealed.

Mr. J. T. Morehead, for plaintiff.

Messrs. Scott & Caldwell and *J. N. Staples*, for defendants.

SMITH, C. J. The libellous matter for which the action is brought, is contained in a newspaper known as the *Kernersville News*, whereof one defendant is owner and the other publisher, and is in these words:

"A white man by the name of Alex. Dean attempted rape upon a little girl of Mr. David Stocks, near Colfax, some time last week. A warrant was issued for Dean, and he was carried before J. A. Davis, Esq., justice of the peace. Squire Davis, after his style of dispensing justice, converts the case into an assault and battery, and discharges the offender of all decency and law upon payment of costs, which was \$30. We presume that Mr. Davis had an eye to the fact that if this grave offender was bound over, or committed to jail, he would lose a handsome fee, and accordingly rendered his decision to suit his own convenience."

The complaint alleges that the defendants in the use and publishing of this language meant to charge that the plaintiff corruptly converted the case, judicially before him, from an assault with intent to commit rape into a charge for simple assault and battery, and that such action was usual with the plaintiff, and according to his style of dispensing justice, and that they further charge that this ac-

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tion of the plaintiff was prompted by the mercenary motive of putting in his own pocket the fees arising from his assumption of jurisdiction of the cause.

The defendants justify the charge in their answer, and at the trial waived all other defences to the action. The only issue consequently submitted to the jury was to the truth of the alleged libel and the damages resulting from the publication, on which the verdict being for the defendant, the inquiry of damages was not made.

The exceptions to the evidence introduced on the question of damages became immaterial upon the finding that the imputations conveyed in the publication are true, and only such require to be noticed as bear upon the issue of justification. The other exceptions are to,

1. The admission of evidence of the plaintiff's retention of fines in the cases disposed of by him in the exercise of his judicial functions, beyond the period of sixty days, within which he is by law required to pay over such moneys to the county treasurer in support of common schools; and

2. To the charge of the court that the plaintiff as a justice of the peace had no jurisdiction of the crime charged in the warrant, other than to inquire into the sufficiency of the proofs to require the commitment or binding over the accused for trial in the court having cognizance, and for want of such to discharge him.

- I. The complaint alleges that the libellous publication meant, not only to impute to the plaintiff corruption and official malfeasance on the trial of the particular cause mentioned, in his action on that occasion, but that it was habitual for him thus to act in administering his judicial duties, the imputation being in the words of the complaint "that such action was usual with the plaintiff, and *according to his style of dispensing justice.*"

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The vindication of the defendants thus required proof not only of the truth of the specific charge in relation to the plaintiff's conduct and criminality on the particular occasion mentioned, but also that on other trials had before him his avarice and greed prevailed over his sense of official duty; and of this evidence was offered of his keeping and failing to pay over funds in his hands belonging to that to be used in the support of public schools. The evidence then to which the objection is directed was pertinent to so much of the charge as imputed to the plaintiff the habitual abuse of his authority for private gain.

This ruling does not conflict with that made in *State v. Lyon*, 89 N. C., 568, where the same publication was made the subject of a public prosecution, as, in this case, evidence was offered and refused of other official misconduct in no respect tending to develop the operation of mercenary motives in the discharge of public duty, but to show other official misconduct in other exercises of his judicial functions, unconnected with the libelous charges. This was of course inadmissible.

The evidence, which is the subject of exception now, is confined to the plaintiff's securing and keeping in his hands sums of money, paid by offenders brought before him, which ought within the restricted statutory period have gone into the school fund, and is offered in support of the plaintiff's habitual practices as charged in the publication. The justification to be a protection must be full and comprehensive, commensurate with the extent of the accusation.

"The justification," says an eminent author, "must always be as broad as the charge; and of the very charge attempted to be justified." Townsend on Slander, §212 and 355.

"The principle is," in the language PEARSON J., in *Sharpe v. Stephenson*, 12 Ired., 348, "the defendant in a plea of jus-

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tification must aver and must prove the identical offense." The same proposition had been announced by the same judge in *Watters v. Smoot*, 11 Ired., 315.

II. The remaining exception is to the charge to the jury that the plaintiff had no right to try the accused (Dean), and, acquitting him of the alleged intent, to proceed to try and punish for the assault alone.

We concur in the statement of the law. The assault with the *imputed intent* is of a higher offence, and is committed exclusively to the superior or inferior court. The justice's inquiry into such a charge is only to commit or bind over to a tribunal of higher jurisdiction, or discharge if no sufficient evidence is brought against him, where one is arrested upon a warrant containing such a charge.

It is an unwarranted assumption of jurisdiction to examine into the grade of the crime according to his determination of the proofs and the character they give it, and then try the offender for the subordinate offence. But the court submitted to the jury a rehearsal of the testimony heard by the plaintiff so as to aid them in arriving at a conclusion as to the corrupt action imputed in the publication, and added that, "to support the defence that the words were true the defendants must satisfy them" that the plaintiff had a practice of acting corruptly in his office for the sake of gain. There is no error, and the judgment must be affirmed.

No error.

Affirmed.

WILCOXON v. LOGAN.

W. K. WILCOXON v. JOHN F. LOGAN.

Negotiable Instruments.

1. A note valid in its origin is not affected by the illegality which vitiates a contract made in reference to it.
2. The assignee of a note not made payable to order or bearer, but to the payee alone, can maintain an action upon it; and so can the owner when there is no written assignment.
3. The taking up the note of another by a stranger to it may be as a purchase or as a payment, and whether it is the one or the other must depend upon the facts of the transaction as given in evidence.

(*State v. Efler* 85 N. C., 585; *Abrams v. Cureton*, 74 N. C., 523; *Ray v. Lipscomb*, 3 Jones, 185; *State v. Brantley*, 63 N. C., 518; *State v. Scott*, 64 N. C., 586; *McLennan v. Chisholm*, 66 N. C., 100, cited and approved.)

CIVIL ACTION, tried at Spring Term, 1883, of ASHE Superior Court, before *Gudger, J.*

Verdict and judgment for plaintiff. Appeal by defendant.

Mr. J. W. Todd, for plaintiff.

Mr. D. G. Fowle, for defendant.

SMITH, C. J. This action commenced on the 17th day of July, 1882, in the court of a justice of the peace and after an adverse trial removed by the defendant's appeal to the superior court, is founded on a note under seal executed on April 19th, 1877, by him to J. M. Grimsley, who, as is alleged in the complaint, sold and delivered it to the plaintiff.

In his answer the defendant denies that the note was transferred, as a subsisting security, and says that it was paid and discharged by the plaintiff and so delivered to

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him ; relies upon the statute of limitations as a bar to the recovery ; and sets up a counter-claim of larger amount consisting in a judgment recovered by one Black against the plaintiff and one Parsons, and assigned to himself.

We do not see the pertinency of the evidence offered upon the issue as to the statute, although it is stated that much was introduced, since the bar can only arise after ten years, and but little more than three years had elapsed after the making the note before bringing the suit, and hence this defence could not be aided by evidence. THE CODE, § 152, par. 2.

It was in proof upon the trial before the jury that Grimsley held a note against the plaintiff for about the sum of one hundred and seventy-five dollars, which he transferred to the defendant for a consideration partly received in money and for the residue of which the latter gave the bond now in suit and claimed by the plaintiff as his property.

An agreement, denominated a compromise, entered into between the plaintiff, the defendant and several other persons, undertaking to adjust controversies among them and to dispose of both criminal and civil suits, was exhibited in evidence, one of the clauses contained therein being as follows :

"The said John F. Logan releases and discharges W. K. Wilcoxon from all liability to him on account of the judgment for one hundred and seventy-five dollars, or thereabouts, lately taken against the said Wilcoxon in Watauga county, and the said W. K. Wilcoxon agrees to pay J. M. Grimsley the amount due from the said John F. Logan to the said Grimsley on account of the note on which this judgment was taken"—the parties thus interchangeably undertaking, each, to pay and discharge the obligation resting upon the other under the notes described.

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Thereupon the plaintiff went to Grimsley and took up the note of the defendant, paying him therefor.

Subsequently, at the defendant's instance, the compromise contract was set aside by the court, that is, as we interpret the words, declared and adjudged to be illegal and void as against public policy, in some judicial proceeding in which its validity was called in question. Subsequent to this ruling the defendant, instead of causing satisfaction to be entered upon the judgment against the plaintiff, as it was stipulated should be done, proceeded to collect its amount from the plaintiff.

It further appears from the defendant's testimony that in payment of a debt of his own, he assigned the judgment recovered by Black against the plaintiff and Parsons to one Carrier, and with the latter's consent brought an action thereon against the plaintiff which terminated in a voluntary nonsuit. Afterwards, the defendant paid Carrier the amount of the judgment and it was restored to him.

The portion of the defendant's testimony in reference to the assignment, elicited upon the cross-examination without objection to its competency, the defendant's counsel asked the court to withdraw from the consideration of the jury, on the ground that it was secondary and inadmissible, which request was refused, and to this ruling the defendant excepts.

In reference to this exception we have only to say that if the objection taken in apt time has any force, the withdrawal of it, after it had been received and heard, was a matter resting in the sound discretion of the court, the exercise of which cannot be reviewed on appeal. This is decided in *State v. Efler*, 85 N. C., 585.

The instructions asked by the defendant in substance are:

1. The note in suit being taken up and paid in pursuance of an illegal contract cannot be recovered on.

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2. The note not being payable to order or bearer, but to Grimsley alone, is not negotiable, and the action cannot be maintained thereon in the plaintiff's name.

3. If the jury accept as true the evidence in regard to the assignment to Carrier and his re-assignment to the defendant, the property in the judgment revested in the defendant and constitutes a good counter-claim.

The court declined to give the first two instructions or the third in very words, but as to the subject matter thereof charged, that if, after the assignment of the judgment to Carrier, assuming it to have been so assigned, the defendant paid Carrier the debt which it represented and took it up, it became his (the defendant's) property and he could set it up as a counter-claim.

I. The first instruction was properly denied, for the note being valid in its origin was not infected with the illegality which vitiates the contract in reference to it. Indeed the nullity of the contract leaves it wholly unaffected and as effectual in the hands of the plaintiff as it was in the hands of the payee, Grimsley.

II. In reference to the denial of the second instruction requested, it is only necessary to refer to the enactment found in section 41, chapter 6, of THE CODE, which has long been in force, and the numerous adjudications appended thereto. Besides, if the note was a non-negotiable security under the former law, the action on it can be maintained by one to whom the money when paid belongs, and not by a former owner who has parted with his interest. THE CODE, § 177; *Abrams v. Cureton*, 74 N. C., 523, and other cases cited under that section.

III. The instruction delivered in place of the third in the series is more in conformity with the testimony, and while in substance the same, is equally favorable to the defendant and furnishes no ground of complaint to him. *Ray v. Lips-*

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comb, 3 Jones, 185; *State v. Brantley*, 63 N. C., 518; *State v. Scott*, 64 N. C., 586; *McLennan v. Chisholm*, 66 N. C., 100.

The verdict being rendered against the counter-claim and for the residue due on the note in suit, upon what grounds we are not advised, unless it be based upon a disbelief of the defendant's testimony as to the re-assignment of the judgment which he had disposed of in discharge of his indebtedness to Carrier, we discover no reasons, based upon the rulings of the court, which alone are reviewable, for the award of a *venire de novo*.

It may have been intended by the appellant to raise the question whether the plaintiff's act in taking up the note was not intended to be and in law was a payment and not a transfer, so that no action would thereafter lie upon it as such. If so, it is not presented in the record.

Moreover, the note was delivered uncanceled to the plaintiff and he swears it was not paid. The circumstances connected with the compromise may have tended to contradict his testimony, but no issue of the kind, as far as the record discloses, was submitted to the jury. It is consistent with all the evidence that the plaintiff advanced his money for the note and took it to be surrendered to the defendant upon the defendant's compliance with his agreement to discharge the judgment for \$175, and that he retained the security unimpaired when the defendant coerced from him payment of that judgment. However, it is sufficient to say the point is not before us, and we see no errors in the rulings which the record brings up for an appellate revision.

The judgment must be affirmed at the cost of the appellant.

No error.

Affirmed.

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NORTH CAROLINA RAILROAD COMPANY v. COMMISSIONERS OF ALAMANCE.

Taxation—Non-resident holder of shares in domestic corporation, exempt.

A non-resident holder of shares in a corporation in this state is not liable to tax here. Such property is beyond the jurisdiction of the state, and subject only to that in which the holder has his domicile. The ruling in this case has no application to banking corporations formed and operated under the act of congress.

(*Railroad v. Com'rs*, 87 N. C., 426; *Redmond v. Com'rs*, *Ib.*, 122; *Belo v. Com'rs*, 82 N. C., 415; *Worth v. Com'rs*, *Ib.*, 420 and 90 N. C., 409; *Kyle v. Com'rs*, 75 N. C., 445; *Buie v. Com'rs*, 79 N. C., 267, cited, commented on and approved.)

CIVIL ACTION tried at Spring Term, 1884, of ALAMANCE Superior Court, before *McKoy, J.*

This action was begun by petition of plaintiff company to defendant commissioners to strike from the tax-list of 1883 the assessment on shares of stock held by non-resident stockholders in plaintiff corporation. The petition was denied, and the plaintiff appealed, and upon the hearing the following facts, by consent, were found by the court below :

1. That plaintiff is a corporation, &c., and its capital stock is four million dollars, divided into shares of one hundred dollars each.
2. That the shares upon which the taxes complained of were assessed, are owned and held by non-residents of this state.
3. That plaintiff's property consists of both real and personal property, and is in this state.
4. That the office and place of business of plaintiff are at Company Shops in Alamance county, North Carolina, and

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the shares of stock are transferrable only on its books at said office.

Thereupon His Honor ruled that the shares of stock owned by non-residents were not liable to taxation, and directed the tax-list to be corrected according to the prayer of the plaintiff's petition, and the defendants appealed.

Messrs. Graham & Ruffin, for plaintiff.

Mr. E. S. Parker, for defendants.

SMITH, C. J. Among the several paragraphs in section 8, chapter 117 of the acts of 1881, enumerating the several subjects of taxation, is the following:

6. Shares in national, state and private banks, railroad, telegraph, canal, bridge or other incorporated or joint stock association, with their true value, and the cashier of each bank or banking association (whether state or national) shall give in to the list-taker for the township in which such bank or banking association is situated, all shares of stock composing their corporation, *as agent for and in the name of the owners of said shares of stock, who may be non-residents of this state*, and the treasurer of each railroad or other incorporated company shall in like manner list the shares of non-resident holders.

In the concluding clause, amended by the act of 1883, ch. 363, § 8, to remove the obscurity pointed out in *Railroad v. Commissioners of Wake*, 87 N. C., 426, it is provided that "stockholders in valuing their shares may deduct their ratable proportion of the value of taxable property, the tax whereof is paid by the corporation.

Section 3 of the act is in these words: Every person required to list property shall make out and deliver to the township list taker a statement, verified by his oath, of all the real and personal property, moneys, credits, investments in bonds, stock, joint-stock companies, annuities or other-

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wise, in his possession or under his control on the first day of June, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor or otherwise.

The power of taxation is conferred in section three, article five of the constitution, which directs that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in stocks, joint-stock companies or otherwise, and also all real and personal property, according to its true value in money; and further authorizes a tax on "trades, professions, franchises and incomes," but not on incomes derived from property that is already taxed.

The constitution evidently contemplates the imposition of taxes upon moneys, credits and investments in corporate stocks, as well as upon other forms of property that are within the jurisdiction of the state and subject to its power.

"Credit" is a term attaching to the creditor and designates property possessed by him in contra-distinction to the correlative word "debt," which has reference to the debtor and a personal obligation resting upon him. The indebtedness is made liable to taxation, as following the person to whom it is due, at his domicile, while it cannot be reached at the domicile of the debtor if the person to whom it is owing be not a resident. This is the import of the constitutional provision and is recognized and enforced as a correct principle in *The State Tax on Foreign-held Bonds*, 15 Wall., 300, by the supreme court of the United States. In that case] FIELD, J., delivering the opinion, says: "Corporations may be taxed like natural persons upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense. They are obligations of the debtors and only possess value in the hands of the creditors. With them they are property and in their hands may be taxed. To call debts property of the debtor is simply to misuse terms. All the property

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there can be in the nature of things, the debts of corporations belongs to the creditors to whom they are payable, and follows their domicile wherever that may be. Their debts can have no locality separate from the parties to whom they are due. * * * * *

The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the state, they are property beyond the jurisdiction of the state."

The court declared that the act directing the company to withhold 5 per cent. of the interest and pay it as a tax into the state treasury impaired the obligation of the contract and was repugnant to the constitution of the United States. Four of the judges dissented as to this last conclusion, and were of opinion that the case was one of state law only and involved no federal element.

In *Tappan v. Mer. Nat. Bank*, 19 Wall., 490, the Chief Justice declares that the power of taxation by any state is limited to persons, property or business within its jurisdiction.

The same proposition in regard to the *situs* of the debt, as determined by the creditor's domicile, for the purpose of taxation, is again affirmed in *Kirtland v. Hotchkiss*, 100 U. S. Rep., 491, reviewed upon a writ of error to the supreme court of Connecticut, where the case was decided in a similar way, 42 Conn., 436. See *Feresman v. Byrons*, 68 Ill., 247; *Burroughs Taxation*, § 41 and 42; *Cooley Taxation*, 15, 63, 134, 270.

Assuming this to be the law, and that the credit, in opposition to the debt, terms which denote the relations between the parties to whom and from whom the debt is owing, except in cases where the indebtedness consists in notes, bonds or other securities which are in the hands of an agent and are, therefore, like visible personal property, having a *situs* of its own for purposes of taxation, as held in

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Redmond v. Commissioners, 87 N. C., 122, must be taxed where the owner has his domicile, we proceed to inquire whether the principle extends to shares of stock, as a distinct form of property, held by non-residents in corporations formed under our laws and doing business in the state.

There can be no question as to the liability of the corporate body to the full measure of taxation to which an individual resident is subject. All of its property, inclusive of its franchise, which (if owned by a citizen could be), may be made to bear its portion of the public burdens by an *ad valorem* assessment, unless protected by some contract of exemption entered into by the state. So a tax may be imposed, measured by the value of the stock which represents the corporate property, upon the corporation, and it be compelled to pay it. Thus, unrestrained by an *ad valorem* rule, it was decided that a tax on bank stock or stock in any moneyed corporation of loan and discount, of fifty cents on each share of one hundred dollars held therein, is a valid exercise of the taxing power possessed by the general assembly of Kentucky. *Nat. Bank v. Commonwealth*, 9 Wall., 353. The tax, though affecting alike the interest of the resident and non-resident stockholders, as does any exaction diminish the resources of the company, is a legitimate burden put upon it in common with other property owners of the state. "The tax is," as Mr. Justice MILLER observes, "a tax upon the shares of the stockholder," but it is nevertheless a tax upon the corporation, the amount of which is ascertained by the number of shares upon each of which is imposed a specific sum to be paid by it. The capital stock of a corporation is made up of shares, and there can be no difference in principle in requiring from it the payment of fifty cents on each share, or of one-half of one per cent. upon the aggregate number of shares, the same in result and varying only in phraseology. In either mode of assessment, the money comes from the corporation and reduces

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its capacity to distribute in dividends. "In the case of shareholders not residing in the state," it is said, in the opinion in the case cited, "it is the only mode in which the state can reach their shares for taxation," the meaning of which is, that the taxing power, while it can take hold of the shares of the stockholders, residing within its reach as separate property, cannot subject those of non-residents, except through the imposition of a tax upon the property of the corporation before its distribution.

But supposing the taxing power to have been exerted to its full extent over the corporation and its property and resources, can a further exaction be demanded of the individual shareholder in respect to his interest in them, separate and apart from the corporate entity created by law, and itself capable of being made to bear its part of the common burden?

Under a provision in the constitution of California, Art. XI. § 13, which requires, as does the constitution of this state, taxation to be equal and uniform, and that all property shall be taxed in proportion to its value, it has been held that where the property of the corporation was taxed, the stock could not be, for this would be double taxation, the latter but representing the former. *Burke v. Badham*, 57 Cal., 594, and this ruling is adopted and enforced in a recent case, *San Francisco v. Mackey*, in the United States circuit court of the district, and reported in 18 Reporter, 609.

The decision rests upon the proposition that the corporate property of every kind exposed to taxation is represented in the value of the stock, and whether the tax be levied upon the one or the other, it is but *ad valorem* tax, and to levy it upon both at the same time would be to duplicate it, and thus disregard the restraints of the constitution. This seems to be sound reasoning, and in consonance with the clause in ours which forbids any tax upon income derived from property already taxed.

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But in our rulings we have so far discriminated between the property of a corporation, and the property in the shares, as to subject to taxation those held by a resident owner in a foreign corporation, notwithstanding the corporate property is taxed in the jurisdiction wherein the separate business is carried on; and this, because such resident has an interest or property annexed to his person and subject to the jurisdiction of the state wherein he resides. *Belo v. Commissioners*, 82 N. C., 415; *Worth v. Commissioners*, *Ib.* 420; *Worth v. Commissioners*, 90 N. C., 409.

Can we also place a burden upon the non-resident holder of shares in a domestic corporation, itself exposed to full taxation, when upon the principle of our own adjudications, he is liable in the state of his domicile to be taxed for the very same property? If the property be taxable here, can it consistently be taxed again elsewhere? If our ruling be sustained—that stock in a foreign corporation owned by one of our citizens can be taxed here, because it follows the person of the owner and has for this purpose its *situs* at the place of his abode—must it not also be true that the property of a non-resident stockholder in one of our own corporations is beyond our jurisdiction and subject to that only within which he has his domicile?

In *The Delaware Railroad Tax*, 18 Wall., 206, a tax was imposed by the state of Delaware upon a proportionate part of a railroad which ran also into the state of Maryland, of one-fourth part of one per cent. upon the value of the number of shares corresponding with the length of the line in the former state, and this sum was required to be paid into the treasury by the company. It was urged that under this statutory apportionment Delaware would get nearly one-fourth of the sum to be paid, while the value of the portion of the road in that state was below that proportion. The court declared that the tax was not “imposed upon the shares of the individual stockholders, nor upon the prop-

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erty of the corporation, but is a tax upon the corporation itself, measured by a per centage upon the cash value of a certain proportionate part of the shares of its capital stock," adding: "The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property."

Recurring to the language employed in the constitution to convey and restrict in its exercise the power to tax, it will be seen that "moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, are placed upon the same basis as 'real and personal property,'" when to be charged with public burdens. The creditor and investor in stocks, &c., are to be taxed, the one upon the debts due him, the other upon his investments, both according to their value; and this, without regard to the place where the debtor lives, or whether the investments are in the stocks of a home or foreign corporation. The words used in the section are applicable to a resident investor or stockholder upon whom the law can operate, but does not seem to contemplate one whose domicil is beyond the limits of the state and the reach of coercive legislation. Neither does any taxable property escape its share of the common burden, since all the resources of the corporate body under the constitution are within the legislative control, and the stockholder only gets his portion of what remains for distribution.

When a tax is upon shares and to be paid by the corporation, it is a tax upon the corporation, and may be exacted as such, when in conformity with the organic law, and while it imposes alike the value of all the shares by whomsoever held, the result is consequential and free from any just complaint. The value of the shares is looked to as a measure of the corporate tax, but no right of the non-resident stockholder is invaded. Ang. & Ames Corp., § 43;

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McKee v. North Co., 49 Pa. St., 519; *Bank v. State*, 9 Yerger, (Tenn.) 490. This last is the only case we have found where the present inquiry is directly met and answered.

Under a statute assessing lands, &c., and "bank stock other than such as may be exempt from taxation as after provided for," it was declared that the tax was not intended to be upon the bank, but upon the owners of the stock held therein, non-residents as well as residents, and the court proceeded to say :

The power to tax non-resident stockholders is denied, and we think correctly. From its very nature it must be a tax *in personam* and not *in rem*. * * * Then bank stock is not a thing in itself capable of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner. If he be a non-resident, he is beyond the jurisdiction of the state and not subject to her laws.

We therefore think that * * * the state has no power to raise a revenue from the stock of non-resident owners, but this may be done from the stock of resident owners. 2 Desty on Taxation, at page 62, section entitled "Shares of Stock of Foreign Corporations" and cases referred to in note.

The tax under review is not imposed upon the company in respect to its stock, upon the value of which as representing the residuary value of all the corporate property the state may put a tax in the absence of an exemption in the charter, but the act separates all resident shareholders, requiring them as owners to list for taxation all such stock as they may have in corporations within and without the state. At the same time it directs the cashier and treasurer of the different classes of corporate bodies to give in the stock of non-residents "*as agent for and in the name of the owners*" respectively and affixes a lien upon the shares, disabling

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the owners to make any transfer until the tax is paid, and further authorizing the company to *pay out of dividends declared in their favor*. Acts 1881, ch. 117, §§ 26, 27.

The effect of the statute therefore is to assess a tax upon the foreign-holder's stock, as a distinct and separate form of property, listed by means of a forced agency, and the stock itself charged with the payment.

The state acquires jurisdiction for taxing purposes over the property itself or the person of the owner found within its limits. All visible property may be taxed wherever it is found. Credits (and stocks are very analagous) have no *situs*, as such, separate from the owner, and must be taxed where he has his domicile. There may be credits, in the form of bonds and other securities which have a taxable *situs* of their own, when in the hands of an agent or trustee as is decided in *Redmond v. Commissioners, supra*.

But it follows that whether the taxation be put upon the corporate property as such, or upon the entire stock, it must be *ad valorem*, and from the valuation must be deducted such as is entitled to exemption by virtue of a contract made with the state and protected by the constitution of the United States, since the shifting of the tax from one subject to the other cannot be allowed to impair such exemptions.

This opinion has of course no application to, nor is it intended to embrace banking corporations formed and operating under the act of congress, the shares whereof, held as well by non-resident as by resident owners, are by express words made subject to the taxing power of the state under certain limitations, those of non-residents being required to be taxed at the place where the banks are located and carrying on business, and the tax enforced through the corporations, as is decided in *Kyle v. Mayor & Commissioners*, 75 N. C., 445; and in *Buie v. Commissioners*, 79 N. C., 267.

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We are therefore constrained to declare that such a tax as that prescribed in the appeal is not within the contemplation of the clause in the constitution which confers the power and directs the manner of its exercise, and we therefore affirm the ruling of the court below. Let this be certified.

No error.

Affirmed.

W. H. RYAN, Trustee, v. B. T. MARTIN and others.

Corporations—Ejectment—Evidence—Estoppel.

1. Where a corporation sues, it is necessary for it to prove its charter and organization, if denied. But where one contracts with a corporation or claims title to land under it, the presumption is that, as to such party, there is a corporate existence.
2. A contract with a party, by name implying a corporation, is to be taken as evidence of the existence of the corporation as to the party contracting with it, rather than an estoppel to disprove such fact.
3. A misnomer of a corporate body, when the parties intended the corporation by its proper name, is not material; and it is competent to prove its name by proper evidence.
4. Where, in ejectment, both parties claim under the same person, neither can deny the title of such person; and this, although one of the parties claims under a sheriff's deed.
5. In such case it is not necessary for the plaintiff to show that the defendant has a complete title, but simply that he claims under the common source, even though it be through an unregistered deed or contract of purchase; and the defendant is at liberty to show a better title in himself obtained from other sources.

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6. Proof by the sheriff that he had an execution in his hands at the time of sale is competent when the execution is lost.

(*Stanly v. Railroad*, 89 N. C., 331; *Institute v. Norwood*, Busb. Eq., 55; *Murphy v. Barnett*, 2 Mur., 251; *Love v. Gates*, *Ib.*, 363; *Gilham v. Bird*, 8 Ired., 280; *Johnson v. Watts*, 1 Jones, 228; *Thomas v. Kelly*, *Ib.*, 375; *Feimster v. McRorie*, *Ib.*, 547; *Miller v. Miller*, 89 N. C., 402, *Ives v. Sawyer*, 4 Dev. & Bat., 51, cited and approved.)

EJECTMENT, tried at July Special Term, 1884, of GUILFORD Superior Court, before *Graves, J.*

The plaintiff bought the land in dispute at a sheriff's sale under a judgment and execution (obtained in a suit begun by attachment under the law as it existed prior to the C. C. P.) against the Deep River mining company; and with a view to conclude the defendant from denying the title of said company, and to obviate the necessity of showing title out of the state the plaintiff put in evidence the transcript of the record of a suit in Rowan superior court, of B. T. Martin (defendant in this case) against the said company, which showed a judgment in favor of Martin, and the same was docketed in Guilford county and executions issued thereon, and returned.

The plaintiff then proposed to prove by the sheriff that he had a *vend. ex.* from Rowan on this Martin judgment, which was lost, under which he had made sale of the lands sued for, subsequent to the sale of the plaintiff, and that Martin was the purchaser. On objection, the court excluded the proof, but allowed the sheriff to state that he sold the land and Martin became the purchaser, to whom he executed a deed. Defendant excepted.

The plaintiff then proved that the lands levied on were the same that was sold and conveyed to plaintiff, and the same that was described in the complaint and in the deed of the sheriff to Martin.

The plaintiff, on objection, was allowed to prove by what

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names the said company was called, to-wit, sometimes the "Deep River mining company," and sometimes the "Deep River copper mining company." Defendant excepted upon the ground that parol evidence was not admissible for such a purpose, and also that the existence of such company, under which plaintiff claims, had not been shown by a charter or an organization; and that its existence not being thus proved, it had no capacity to hold and have title to land, and therefore the sheriff's sale and deed to plaintiff conveyed no title, and the deed was void; and further, that the doctrine of estoppel does not apply in this case, and the plaintiff must show title out of the state to enable him to recover.

His Honor, being of opinion against the defendant, instructed the jury accordingly. Verdict and judgment for plaintiff, and appeal by defendant.

Messrs. Morehead, Staples and Batchelor & Devereux, for plaintiff.

Messrs. Scott & Caldwell, for defendant.

MERRIMON, J. The defendant contended, that it did not appear by any proper evidence that the Deep River mining company had any corporate organization or capacity to hold and have title to land, or other property, and therefore, the deeds put in evidence on the trial were void.

It is true, that it must appear that there was a corporate existence either *de jure*, or *de facto*, at least. And if the corporation itself were suing, it would be necessary for it to prove its charter and an organization in accordance therewith, if these were properly put in issue. But if a person entered into a contract with a body purporting to be a corporation, or claims to hold property purchased and derives title thereto from it, this is *prima facie* evidence against such person that such corporation was in existence *de facto* at

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least, at the time of the contract with or purchase from it, and the presumption arises in such case, that the existence of the corporation continues at the bringing of the action.

Accordingly, it has been held in an action against the maker of a promissory note executed to a corporation as payee, in its corporate name, the production of the note duly endorsed to the plaintiff was sufficient evidence that the corporation was duly organized and competent to transact business. *Williams v. Cherry*, 3 Gray, 215, 220. It was said in that case, that "the defendants, by giving their notes to the corporation in their corporate name as payees, admitted their legal existence and capacity to make and enforce the contracts declared on, so far at least, as to render proof on that point unnecessary in the opening of the plaintiff's case."

And in *Jones v. Cincinnati Type Foundry Co.*, 14 Ind., 90, it was so held. In that case, the action was brought by a corporation upon a note executed to it in its corporate name; the defendant, in his answer, insisted that the plaintiff had no legal capacity to sue, because it was not a corporation. The court held, however, that the production of the note was sufficient evidence to warrant a judgment for the plaintiff, no other evidence having been offered. In that case, it was said, "As a general proposition, it is the law of this state, (Indiana,) that a contract with a party as a corporation, estops the party so contracting to deny the existence of the corporation at the time it was contracted with as such. * * * In New York, to work such estoppel, it has been necessary that the contract should state that the party contracted with was a corporation. But this rule does not prevail in other states. It has not been acted upon in this state. If the style by which a party is contracted with is such as is usual in creating corporations, viz: naming an

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ideality, but disclosing that of no individual, as is usual in the cases of simple partnerships, it has been treated as *prima facie*, at least, indicating a corporate existence. * * *

But in this class of cases it would seem, after all, that the courts have proceeded upon a rule of evidence rather than the strict doctrine of estoppel. They have treated the contract with a party by name implying a corporation, really as evidence of existence of a corporation, more than an estoppel to disprove such fact."

This seems to us a just and reasonable exposition of the rule of law applicable in such cases. It is not to be presumed that a party will contract and deal with a nonentity. It will be presumed to the contrary as to him, that he did not. *Stanly v. Railroad*, 89 N. C., 331. Mor. on Pr. Corp., §§ 136, 138.

The objection that the corporation in question was sometimes called the "Deep River mining co.," and likewise, "Deep River copper mining co.," and other like names, is not well founded. A corporate name is essential, but the inadvertent or mistaken use of the name, is ordinarily not material, if the parties really intended the corporation by its proper name. If the name is expressed in the written instrument, so that the real name can be ascertained from it, this is sufficient; but if necessary, other evidence may be produced to establish what corporation was intended. And the same rule applies to devises and bequests to corporations. A misnomer of a corporation has the same legal effect as a misnomer of an individual. *Deaf & Dumb Inst. v. Norwood*, Bus. Eq., 65; Mor. on Pr. Corp., §§ 181, and cases there cited.

The defendant likewise insisted that, admitting the deep river mining company was the source of title common to the plaintiff and defendant, and was capable of holding and having title to the land in question, the sheriff's deed to the

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defendant put in evidence, could not so operate as to estop the latter from denying the title of the company, and thus relieve the plaintiff from the burden of showing title out of the state, because, the evidence offered in respect to such deed was mainly parole, and not the deed itself.

It is a well established rule of law, that when both the plaintiff and defendant claim the property in controversy under the same person, neither of them can deny the right or title of the person under whom they so claim; and as between themselves, the one having the elder has the better title and must prevail. The conclusion thus established between the parties is not strictly and technically an estoppel, but it is in the nature of and has the practical force and effect of an estoppel. This rule of law is founded in justice and convenience, and its purpose is to prevent the necessity on the part of the plaintiff in cases like this, of proving title out of the state, and a good title in the person under whom he claims, when the opposing party claims the same property under the same person. If the defendant has the same source of title as the plaintiff, and no other, wherefore need the plaintiff go beyond that as to the defendant?

Such an inquiry would be idle. It is plain that no injustice in such case could be done the defendant; and if the rule were otherwise, it might and would in many cases put the plaintiff to great inconvenience and much needless expense. This court has recognized and upheld the rule in many cases. *Murphy v. Barnett*, 2 Murph., 251; *Ives v. Sawyer*, 4 D. & B., 51; *Love v. Gates*, Id., 363, *Giltiam v. Bird*, 8 Ire., 280; *Johnson v. Watts*, 1 Jones, 228; *Thomas v. Kelly*, Id., 375; *Feimster v. McRorie*, Id., 547.

It is not necessary to show that the defendant has a complete title to the land; if there is no title paramount to it, it is sufficient to show that under a valid contract he claims to hold and has possession of the property under the common source. If the defendant has a bond for title, or other

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contract of purchase, or an unregistered deed for the land, and is in possession thereof, this will be sufficient evidence of a claim under the common source. It will be presumed that he claims under such contract. The purpose is to show that he claims the property under the common source—that he admits his relation to it and claims under it, without regard to the sufficiency or perfectness of the title.

In *Gilliam v. Bond, supra.*, the defendant claimed by virtue of a sheriff's deed, but it did not appear that he ever took the deed, and it was not put in evidence; but as he claimed by virtue of such purchase and deed, this court held that he was estopped to deny the common source of title.

Nor is the fact that the defendant in this case claims under a sheriff's deed, a valid objection to the application of the rule mentioned above. It was so expressly decided in the like case of *Feimster v. McRorie, supra.*

But while the defendant is thus concluded as to the common source of title, he may show a better title in himself obtained from other sources than that of the person under whom he so claims.

The objection to the competency of the evidence of the sheriff in respect to the sale, the fact that he had a *venditioni exponas* in his hands at the time of the sale, it appearing that the *ven. ex.* was lost, cannot be sustained. *Miller v. Miller*, 89 N. C., 403, and cases there cited. *Cowles v. Hardin, ante* 231.

Nor is the objection to the evidence of the sheriff in respect to the deed of defendant a valid one. The purpose of introducing the deed was not to show title, but that the defendant in possession of the land claimed it under the same party that the plaintiff claimed under.

No error.

Affirmed.

CHAMBERS v. RAILROAD.

H. J. C. CHAMBERS, Adm'r, v. WESTERN NORTH CAROLINA RAILROAD COMPANY.

Negligence—Railroads—Damages.

A servant cannot recover damages of the employer for an injury resulting from the alleged negligence of the latter, when the servant's want of ordinary care contributes to the injury, or where by the exercise of such care he might have avoided the injury. The facts of this case show that the brakeman, the plaintiff's intestate, was guilty of contributory negligence in attempting to board the train while in motion.

(*Farmer v. Railroad*, 88 N. C., 564, cited and approved.)

CIVIL ACTION tried at Spring Term, 1884, of IREDELL Superior Court, before *Shipp, J.*

The action is brought to recover damages for alleged negligence on the part of defendant in causing the death of Otho Chambers (the intestate of plaintiff) who was a brakeman in the service of the company.

The plaintiff introduced one Horah who testified that on the night of the accident he was a brakeman on defendant's train; that the train ran into Newton, a depot on the road, and then backed out to the main line at the "Y" about midnight and was going west; the intestate was also a brakeman on same train, whose duty it was to open and close the switch, when the train backed out; the night was dark, and it had been raining and the ground was muddy; the intestate left the train, as it backed out, to adjust the switch, and the witness remained on the train; it was running at the rate of four or five miles an hour when the witness saw the deceased about twenty feet east of the switch with a lantern in his hand; he saw him approach the train and then saw the lantern suddenly go out; the alarm sig-

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nal was immediately given and the train stopped in about the length of four cars.

The witness further testified that he went back and found the deceased in the ditch by the track, with one leg badly crushed—it was about the spot where he saw deceased before this. The deceased said that as the cars were passing he tried to get on, and his foot slipped and he fell. It was admitted that deceased died of his wound, and that plaintiff was his administrator.

In answer to plaintiff's question, "When ought deceased to have gotten on the train?" he said, he ought to have gone to the car before it started, and he further testified that the rules of the company, which were known to the deceased, required him to come back to and get on the train before it started. Witness said it was his (the deceased's) duty, after he boarded the train to give his signal with his lantern to the engineer to start; that the engineer should not start until the switchman gave the signal. The deceased did not come back to the train before it started; train always starts at switch when switchman gives signal.

Another witness of plaintiff testified that he understood the rule to be that the switchman after closing the switch should walk down to the train and get on and report to the conductor, and that the conductor would give the signal to start.

The defendant's witnesses all concurred that the rule required the switchman to get on the train after the switch was closed, and before the train began to move.

The fireman of the engine testified that as the train backed out the deceased was at the switch, and asked witness for a chew of tobacco; that when the train stopped in the switch the deceased instead of going back to the train, remained at the switch and gave the signal with his lantern to advance, and called to the engineer to hurry up;

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that as the train passed out by deceased, the witness gave the deceased the tobacco at the switch, and did not see him any more until the train was stopped. Conover depot, all the witnesses testified, was in 250 yards of the switch, and that the train always stopped there after leaving the switch, and did so that night—it was a regular station.

A witness of defendant testified that deceased said just after he was injured, "I tried to catch to the two iron rods and missed one and the motion of the train turned me under the cars."

The conductor of the train was asked by plaintiff, if he was in supreme command of the train, and he answered, "yes;" but the engineer was equally responsible in the running of the train, and in this respect had control of all except the conductor.

On his examination by defendant, the conductor testified that his duties were

"To look after the passengers, take up tickets, see that train kept on time, that lamps and signals were in order, that he was subject while running to the orders of the train dispatcher, superintendent and president; that he had no right to employ hands or discharge them, that he could suspend them temporarily and report to the superintendent, who had the power to discharge them or not; that he had no power to purchase materials, that when he reached the terminus of the road he left the train and had no further control of the cars, that he and the engineer were equally responsible for the correct running of the train." The conductor's character was admitted to be good.

There was evidence tending to show that the intestate was thirty-nine years old and healthy, and his wages \$15.00 per month, and good character for industry.

When the evidence closed His Honor intimated an opinion that upon the whole case the plaintiff was not entitled

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to recover, and said he would so instruct the jury. Whereupon the plaintiff took a non-suit and appealed.

No counsel for plaintiff.

Messrs. D. Schenck and Reade, Busbee & Busbee, for defendant.

ASHE, J. The intestate of the plaintiff was a switchman on the Western North Carolina railroad, and it was his business, when the train ran back from Newton down to the "Y" into the regular track, to change the switch so that the train might proceed in its regular course.

The train, at the time the plaintiff's intestate was injured was running west and the switch where the accident happened was about 250 yards east of Conover station, which was a regular station.

The witnesses for the plaintiff disagreed as to whose duty it was to give the signal to the train to move on after closing the switch, but all the witnesses for the defendant concurred that the rule required the switchman to get on the train after the switch was closed and before it began to move. The train necessarily must have stopped after passing through a switch like that, where it had to back down the main track and then change its course. It was at this point, according to the evidence, it was the duty of the deceased to have got on the cars—the witnesses concurring that it was the rule of the company after the switch was closed for the switchman to go down the road and get on the cars while they were stationary, and as a servant of the company it was his duty to obey its rules. *Pierce on Railroads*, 378, note 3.

But the deceased violated this rule, for after he had closed the switch, and the cars had backed down the main track to where they stopped for retrograde movement, the deceased, instead of going down to where they had stopped, in

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compliance with the rules of the company, remained near the switch, and waived his lantern for the engineer to advance, and we must infer that the train was delayed longer than usual at the switch before reversing its course, for the switchman, while waiving his lantern for the train to advance, called out to the engineer to "hurry up," as if there was some delay of which he was impatient.

As the train passed him he attempted to get aboard. The night was *dark and the ground muddy*, and although the train is said to have been running at the speed of only four or five miles an hour, yet it was moving at a rate sufficiently fast, as the deceased said to one witness, to throw him around under the cars on his missing to catch one of the iron rods.

What was this but gross neglect on the part of the deceased? If he had gone back to the train when it stopped near the switch, or had walked up to Conover station, where the train always stopped and did stop that night, he could have reached it by walking at an ordinary pace, and could have got aboard while it was motionless.

There was no danger of his being left, and no necessity for him to take any risk.

When there are two modes left to a party for performing his duty, one of which is safe and another exposes him to danger, and he takes the latter as a matter of choice, he cannot complain if he sustains an injury. Pierce on Railroads, 378, note 2. In doing so he contributes to the injury, and is the proximate cause thereof. "The servant cannot recover, if his own want of ordinary care has contributed to the injury, or when, by the exercise of ordinary care, he might have avoided it." * * His negligence may consist in a reckless exposure of himself, as in an attempt to get on a train when running at a speed which makes the attempt dangerous. Pierce on Railroads, 737, and the numerous cases there cited in support of the posi-

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tion. The rule under this head is that the plaintiff cannot recover damages, if the injury could have been avoided by the exercise of ordinary or reasonable care on his part.

It makes no difference if the injury was caused partly by the negligence of the defendant, if with ordinary care it could have been avoided by the plaintiff. In *Butterfield v. Forrester*, 11 East., 66, which is a leading case, it was held that, "although A has been injured by B's negligence, A may not maintain an action against B for the damages, if A could have avoided receiving the injury by the exercise of ordinary care on his part."

And again in *Robinson v. Cone*, 22 Vt., 213, it was declared that in order to sustain an action for negligence of the defendant, whereby the plaintiff is alleged to have sustained an injury, it must appear that the injury did not occur from any want of ordinary care on the part of the plaintiff in whole or in part. Upon same point is *Farmer v. Railroad*, 88 N. C., 564.

In this case it is too manifest that the plaintiff's intestate came to his death by his own reckless act in attempting to board the train while in motion, which he could have avoided by the exercise of the ordinary care which is usually employed by men of common prudence.

The plaintiff is, therefore, not entitled to recover in this action, and the judgment of the superior court is affirmed.

No error.

Affirmed.

WALL v. WILLIAMS.

S. C. WALL v. WILLIAMS & ROBBINS, Ex'rs.

Contract—Tort—Issues—Severance of trees.

1. The plaintiff sues an executor for compensation for services rendered his testator during the latter part of his life, upon an alleged promise made by the testator. The defendant sets up, by way of counter-claim, a contract of lease between the testator and the plaintiff, under which the plaintiff entered upon the land, and in which it was agreed that the latter should have the farm for five years upon his furnishing a support to the testator and his wife; and further alleges that plaintiff has cut down the timber on the premises and sold the same for a considerable sum and appropriated it to his own use. The plaintiff, in his replication, denies the counter-claim and his liability as alleged; *Held*, error to refuse to submit an issue to the jury (tendered by defendant), as to whether, during the life time of the testator, the plaintiff cut and appropriated the timber, as alleged, and the value of the same; and also the facts involved to the alleged counter-claim.
 2. *Held further*, The separation of the trees from the land converted them into personal property, but the title to them at once vested in the owner of the land.
 3. Where personal property is tortiously taken and sold, the owner may waive the tort, affirm the sale, and recover upon a count for money had and received to his use.
- (*Burnett v. Thompson*, 6 Jones, 210; *Potter v. Madre*, 74 N. C., 36, cited and approved.)

CIVIL ACTION tried at July Special Term, 1884, of RANDOLPH Superior Court, before *Graves, J.*

Verdict and judgment for plaintiff, appeal by defendants.

Messrs. Scott & Caldwell, for plaintiff.

Mr. M. S. Robins, for defendants.

SMITH, C. J. The plaintiff's complaint demands com-

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pensation for services rendered to the testator of the defendants, a diseased and aged man of eighty years, during the latter part of his life and subsequent to the death of his wife, for which he and the guardian, into whose hands he had been committed, promised to pay.

The defendants, besides denying their testator's liability, set up in defence a covenant of lease entered into between him and the plaintiff, which they relied on, as excluding any such charge and furnishing material for a counterclaim in connection with the facts alleged.

The lease is made part of the answer and is in these words:

STATE OF NORTH CAROLINA, }
RANDOLPH COUNTY. }

I, Daniel Williams, of said county, agree with S. W. Wall to lease his farm to said Wall five years, and he is to furnish him and his wife plenty for to support them and furnish them with fire wood in their yard: Now the said Wall is to have possession on the 1st day of October, 1879, and to have all he can make after we get our support. I, Daniel Williams, agree to keep what provisions I have on hand on the 1st day of October, 1879, to support myself and wife, and stock, and at the end of five years, the said Wall is to furnish the same amount or leave that much with us; the said Williams is to keep one cow and calf, one or two hogs, &c. The above agreement is to be in full force the 1st day of October, 1879.

Signed in the presence of B. Milligan, and left in his possession May 9th, 1879. Witness our hands and seals.

DANIEL WILLIAMS, [Seal.]

S. W. WALL, [Seal.]

Witness: BENJ. MILLIGAN.

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The answer further states that the plaintiff was let into possession of the farm in the fall of 1879 or in December of that year, and has been occupying it under the contract since :

That the testator's wife Rachael died in January thereafter and her husband surviving lived until June, 1882 :

That the plaintiff has not only appropriated the rents and profits of the land to his own use, but claims a right to do so during the full term of five years, and has cut, hauled away, sold and converted to his own use, timber growing upon the premises of the value of five hundred dollars or more ; and, that he has never accounted for any portion of the rents and profits, nor for the timber cut and disposed of, nor for the value of the provisions that passed into his hands when he entered into possession, and which he was to replace when the lease expired.

The plaintiff's replication denies the counter-claim or his liability upon any of the matters set out in the answer.

The plaintiff tendered the following issues to be submitted to the jury :

1. Did the plaintiff render the services claimed in the complaint ?

2. Were such services rendered at the request of the testator or of any one authorized to make such request ?

3. What was the value of such services ?

Without objecting to these, the defendants offered others also to be submitted, to-wit :

1. Did the plaintiff at the time he took charge of the testator enter into the contract set up in the answer with the understanding that the rents and profits embraced in the contract should compensate him for what he should do for the testator and his wife ?

2. What was the rental value of the land ?

3. Did the plaintiff cut and appropriate to his own use, during the testator's life timber growing on the land ?

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4. If so, what was the value of the timber so cut and applied to plaintiff's use?

5. Was any property of the testator taken possession of by the plaintiff when he entered upon the land, for which he was to account under the contract, and has not accounted?

6. What was the value of the property so taken and used?

These six issues, on plaintiff's objection, were ruled out, and only the three first submitted to the jury, in all of which the findings were in favor of the plaintiff, and he had judgment, from which the defendants appeal.

The first and second of the rejected issues were properly refused as involving a parol addition to or explanation of the terms of a written contract, which is wholly inadmissible.

The fifth and sixth issues encounter the same objection, in that, they embrace matters specially provided for in the covenant, and for which the plaintiff was to account at the expiration of his term.

The third and fourth issues, if found in the affirmative, do show a counter-claim which the defendants have a right to use in reduction of plaintiff's demand.

The defendants allege in their answer a severance of trees from the land and a sale and conversion of them to the plaintiff's own use, which we take to be the inquiry which the court refused to make of the jury, contained in the rejected issue.

The separation of the trees converted them into personal property, and the title to them at once vested in the owner of the inheritance.

This, as remarked by the late Chief Justice in *Burnett v. Thompson*, 6 Jones, 210, if there be tenant for years or for life, and a stranger cuts down a tree, the particular tenant may bring trespass and recover damages for breaking his close, treading down his grass and the like. But the re-

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maindorman or reversioner in fee is *entitled to the tree*, and if it be converted may bring trover and recover its value. The reason is the tree constitutes a part of the land; its severance was waste which is an injury to the inheritance; consequently the party in whom is vested the first estate of inheritance, whether in fee simple or fee tail, (for it may last always) is entitled to the tree as well after it is severed as before, his right of property not being lost by the wrongful act of severance by which it is converted into a personal chattel. Such remainderman or reversioner has his election either to bring trover for the value of the tree after it is cut, or an action on the case, in the nature of waste, in which, besides the value of the tree considered as timber, he may recover damages for an injury to the inheritance, which is consequent upon the destruction of the tree.

So in *Potter v. Madre*, 74 N. C., 36, where the husband of one entitled to an estate in dower in the descended lands of a former husband, cut down timber and built from the material a canoe which the reversioners obtained possession of under unauthorized proceedings, and thereupon the plaintiffs brought their action against the reversioners. Delivering the opinion RODMAN, J., says: The plaintiff had a right to cut trees for the necessary repair of the farm buildings, but none to cut trees for building a boat to be used for fishing. When the trees were felled, *the property in them vested at once in the reversioners*, who could have maintained trover, or by our statute, replevin, and could have recovered for so much as the plaintiff could not show that he had applied to a lawful purpose, such as the repair of the buildings, &c. These propositions were resolved in *Bowles case*, 11 Rep., 79, and have been recognized as law ever since.

It is equally well settled that where the personal property of another is tortiously taken and sold, the owner may waive the tort, affirm the sale, and recover the moneys re-

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ceived from the wrong-doers, as moneys received to the plaintiff's use.

When the defendant has tortiously taken the plaintiff's property and sold it, or being lawfully possessed of it, has wrongfully sold it, the owner may ordinarily *waive* the tort and recover the proceeds of sale under this count, (for money had and received to the plaintiff's use). 2 Greenl. Evi., § 120.

The same proposition is announced by another author in these words: Although it is not in all cases, where a party has converted the goods of another to his own use, that the tort may be waived and the transaction changed into a contract for goods sold and delivered, yet if the goods be converted into money, the *plaintiff may waive the tort* and recover the money. 1 Steph., N. P., 286; 1 Wait. A. & D., 405, 407; *Hallock v. Mixer*, 16 Cal., 574.

But we are not entirely satisfied that the service rendered and attention bestowed upon the testator, during the period he survived his wife, are not comprehended in the plaintiff's undertaking "to furnish him and his wife plenty for to support them" during the lease if they so long live; and if so, the promise to pay would be without consideration. The performance of a legal duty cannot be a consideration for a promise to perform that duty, as the promise does not add to the existing obligation.

Are not the service and attention incident to their being supported, though in the present case they were far more onerous than perhaps ever contemplated by either party. Would a total neglect of their most common wants when living on the same farm be consistent with their agreement for a support to be afforded by the plaintiff? Is the word to be construed as restricting the contract to the furnishing of food merely, and fuel for cooking and warmth?

Is it to be taken as the expressed intent of the parties that the plaintiff should have the use of the premises for

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five years, as under the lease he is clearly entitled, with no obligation assumed beyond the supply of food and fuel to the aged husband and his wife? These obnoxious considerations embarrass us in giving so limited a meaning to the word as to let in a claim to any, the smallest, service to be rendered.

But we forbear to express any decisive opinion upon the point, as it is not necessary in passing upon the exceptions brought up by the appeal.

For the error pointed out in refusing to submit to the jury the facts involved in the alleged counter-claim, there must be a new trial. To the end that a *venire de novo* be awarded, let this be certified.

Error.

Venire de novo.

 P. H. SPILLMAN v. AUGUSTUS WILLIAMS and others.

Service of process by publication—Attachment—Judgment.

1. Service of process by publication must be made in strict compliance with the statutory requirements; but a mere irregularity in the steps preliminary to publication will not affect the validity of a judgment obtained upon such service, while it is sufficient ground for an application to set the judgment aside.
 2. In attachment proceedings, the insufficiency of an affidavit does not render the whole proceeding void: it makes the judgment irregular only, not liable to be impeached collaterally.
- (*Williams v. Woodhouse*, 3 Dev., 257; *White v. Albertson, Ib.*, 241; *Jennings v. Stafford*, 1 Ired., 404; *Stallings v. Gulley*, 3 Jones, 344; *Armstrong v. Harshaw*, 1 Dev., 187; *Burke v. Elliott*, 4 Ired., 355; *Hervey v. Edmunds*, 68 N. C., 243; *McKee v. Angel*, 90 N. C., 60; *Haines v. Dalton*, 3 Dev., 91; *Jones v. Judkins*, 4 Dev. & Bat., 454; *Carroll v. McGee*, 3 Ired., 13; *McElrath v. Butler*, 7 Ired., 398; *Ludwick v. Fair*, 7 Ired., 422; *Hooks v. Moses*, 8 Ired., 88; *Hiatt v. Simpson*, 13 Ired., 72; *Grier v. Rhyne*, 67 N. C., 338, cited and approved.)

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EJECTMENT, tried at Fall Term, 1883, of YADKIN Superior Court, before *Shipp, J.*

This action was brought to recover the land described in the complaint. The defendants claimed title thereto as hereinafter indicated.

On the 26th day of March, 1873, C. W. Williams brought his action before a justice of the peace in Yadkin county against the plaintiff to recover the sum of \$125.35. The summons in that action was made returnable on the 28th day of April, 1873. On the same day it was issued the sheriff made this return thereon: "Defendant not to be found in Yadkin county—said to be in the state of Iowa."

On the same day, the justice of the peace, upon application and an affidavit,—the material parts of which are as follows: "first, that the defendant, P. H. Spillman, is indebted to the plaintiff in the sum of \$125.35, or thereabouts, which sum is due by note; and secondly, that defendant is not a resident of this state,"—granted a warrant of attachment in that behalf, returnable before him on the 28th day of April, 1873. This warrant was levied upon the land of the plaintiff in this action.

No order of publication of the summons, or notice thereof, or notice of the warrant of attachment appears, otherwise than is stated below.

On the 28th day of April, 1873, the justice of the peace gave judgment, the material parts of which are in these words: "Summons returned March 26th, 1873. Case came on for trial: defendant not found: said to be in, the state of Iowa: it is adjudged that plaintiff have judgment by default for the sum of one hundred and fifteen dollars principal money: interest twelve dollars and seven cents with costs of this action.

April 28th, 1873.

H. B. BROWN, J. P."

"Plaintiff prays an attachment, which is granted; due advertisement being made for 30 days. Defendant fails to ap-

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pear and answer according to law. Judgment final granted and property condemned to use of plaintiff.

April 28th, 1873.

H. B. BROWN, J. P."

The justice of the peace certified his judgment and the attachment proceedings to the superior court, June 3, 1873, and the judgment was there docketed. Thereupon, the clerk of that court issued an execution, commanding the sheriff of Yadkin county, "of the goods and chattels, lands and tenements of P. H. Spillman, if to be found in your county, you cause to be made the sum of one hundred and twenty-seven dollars and seven cents; one hundred and fifteen dollars is principal money, besides the further sum of two dollars and sixty cents costs in said suit expended, whereof the said defendant is liable as appears to us of record in the suit of C. W. Williams against P. H. Spillman in justices's court before H. B. Brown, Esq., and transferred to the judgment docket of this court on the 3d day of June, 1873."

The sheriff made return of this execution to the effect that he had levied the same on 62 acres of land; that he had sold the same, and C. W. Williams, the plaintiff in the execution, became the purchaser at the price of \$105, which sum was applied to payment of costs, and to part payment of the judgment, and a deed was made by the sheriff to the purchaser.

It appeared in evidence on the trial, in this action, that the plaintiff had at the time of the trial, been absent from this state ever since before 1873. It did not appear that any publication of notice of the summons or the warrant of attachment, granted by the justice of the peace, was ever made, except as stated by him in his order touching the warrant of attachment made next after his judgment for the debt.

It likewise appeared that C. W. Williams died intestate in March of 1876, and the defendants, except the defendant, Augustus Williams, are his heirs at law, and as such, they

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made application to the proper court and the land in question was sold for partition ; at that sale the defendant, Augustus Williams, became the purchaser, and he paid a part of the purchase money.

The plaintiff insisted that the judgment given by the justice of the peace and the warrant of attachment and the sale of the land under and in pursuance of the same, were absolutely void, and passed no title to the land to the defendants as such heirs-at-law.

The defendants on the contrary, insisted that the judgment, the attachment proceedings and the sale of the land under them, were in all respects valid and passed the title to the land to the defendants, heirs-at-law ; and at all events, the judgment, attachment and other proceedings were at most only irregular and not void, and therefore could not be attacked collaterally in this action.

The court held that the judgment and the other proceedings in connection with and following it, were void and of no effect. The defendants excepted.

There was a verdict and judgment for the plaintiff and the defendants appealed to this court.

Messrs. Furches and Williamson, for plaintiff.

Messrs. Clement & Gaither, for defendants.

MERRIMON, J., after stating the case. Although a judgment be irregular or erroneous, yet, if the court granting it had jurisdiction of the parties to, and the subject matter of the action in which it was granted, it is not void, and it cannot be attacked collaterally for such irregularity or error. If it be irregular, that is, if it be granted contrary to the course of the court, it may be set aside, or corrected upon application of the party aggrieved in the action in which it was granted, by motion or other proper proceeding. If it be erroneous, that is, if it be granted upon an

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erroneous view of the law applicable to the case in some material respect, the court granting it may, in apt time, correct its own error of law; or it may be corrected in an appellate court. *Williams v. Woodhouse*, 3 Dev., 257; *White v. Albertson*, Id., 241; *Jennings v. Stafford*, 1 Ired., 404; *Stallings v. Gulley*, 3 Jones, 344.

And in courts of record of general jurisdiction, where the court assumes jurisdiction, there arises a presumption in its favor, nothing appearing in the record to the contrary. This presumption may, however, be rebutted by a proper proceeding in the action. But no presumption in favor of the validity of a judgment can be allowed in opposition to a material statement or fact mentioned in the record, that tends to show the absence or want of jurisdiction.

But, if the court shall undertake to grant a judgment in an action where it has not jurisdiction of the parties to, and the subject matter of the action, and this appears upon the record by its terms, or by necessary implication, what purports to be, and has the semblance of, a judgment will be void and have no effect, and it may be disregarded and treated as a nullity everywhere and under all circumstances, because such act of the court would be *coram non judice*. If, for example, the defendant in an action had not been served with a summons, or had no notice to defend his right, and he did not appear in person or by attorney, and this appears in the record, any entry of what might purport to be a judgment against him would be a nullity, and all courts would so treat it. This is so because it is against natural justice as well as fundamental right, to take judgment against a man without giving him notice or opportunity to defend himself and his rights of property. *Armstrong v. Harshaw*, 1 Dev., 187; *Jennings v. Stafford*, *supra*; *Burke v. Elliot*, 4 Ired., 355; *Stallings v. Gulley*, *supra*; *Hervey v. Edmunds*, 68 N. C., 243; *McKee v. Angel*, 90 N. C., 60; Free. on Jud. § 116, *et seq.*

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It is a settled rule of law, that there must be a strict observance of the statutory requirements in respect to constructive service of process in actions by publication. It must appear on the record in some way that the prerequisites of the statute have been substantially complied with before any presumption in favor of a judgment resting upon such service arises. This does not imply, however, that mere irregularities in the preliminary steps to publication and the orders made in respect thereto, necessarily render such judgments nullities, and therefore to be disregarded; indeed, ordinarily they do not; but they may be grounds, upon proper application in the action, for setting the judgment aside. If it be stated in the record of the action, that upon application publication as to the defendant therein was duly made, and this appears with reasonable certainty, the judgment would not be void, although the affidavits and orders in respect thereto might not appear. In such case the presumption would be in favor of the regularity of the judgment, however irregular it might be, and it could not be attacked collaterally. Such a statement or finding in substance or effect, is taken as showing that the court adjudged properly that it had jurisdiction of the party, obtained in the way and manner provided and allowed by law. *Omnia præsumuntur solenniter esse acta.* Freeman on Judg'ts, §§ 124, 126, *et seq.*

The judgment relied upon by the defendants was granted by the justice of the peace. It seems to be in some respects irregular, and the proceedings in the action, leading to and upon which it rests, were not very orderly, though rather more so than is usual in like cases. The proceedings show very plainly that the action was begun regularly by a summons; that a warrant of attachment was sued out and levied upon the land of the defendant therein; that publication was made; that judgment was granted and docketed in the office of the superior court clerk of the county of Yad-

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kin, thus giving it the force and effect of a judgment of that court.

It was insisted on the argument that the affidavit upon which the warrant of attachment was granted and publication was made, was insufficient. If this be granted, such insufficiency did not render the whole proceeding in the action, including the judgment, void—it would only affect the judgment with irregularity. It appears that publication was duly made; the justice of the peace so found and noted the fact in the minutes of the proceedings, and his findings must be accepted here as true. Indeed, every intendment is in favor of the regularity of the judgment; the presumption is that it was regularly granted, and there is nothing appearing in the proceedings going to show that there was not constructive service of the summon and notice of the warrant of attachment by publication as required by law. So that the justice of the peace got jurisdiction of the parties to the action, and there is no question that he had jurisdiction of the subject matter thereof.

The proceedings and judgment of the justice of the peace do not constitute a record, but for many purposes they have the qualities thereof. They are conclusive in their effect. They determine, between the parties to the action, their rights respectively in litigation, and in any subsequent proceeding to enforce the judgment, neither party can deny the facts settled by it. The judgment, apparently regular, cannot be collaterally impeached. It is a judicial proceeding and is conclusive, until it shall be set aside for irregularity, or modified, or reversed in the appellate court for error. The proceedings of justices of the peace are not generally formal, but the statute requires that they shall be regarded favorably and upheld when substantially sufficient without regard to form. *Haines v. Dalton*, 3 Dev., 91; *Jones v. Judkins*, 4 D. & B., 454; *Carroll v. McGee*, 3 Ired., 18; *McElrath v. Butler*, 7 Ired., 398; *Ludwick v. Fair-*

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Id., 422; *Hooks v. Moses*, 8 Ired., 88; *Hiatt v. Simpson*, 13 Ired., 72; *Grier v. Rhyne*, 67 N. C., 338.

We are of opinion that the court below erred in holding that the judgment relied upon by the defendants was void, and because of such error they are entitled to a new trial, and so we adjudge.

Let this opinion be certified according to law.

Error.

Venire de novo.

D. C. SALISBURY v. WESTERN NORTH CAROLINA RAILROAD COMPANY.

• *Railroads—Consequential Damages—Party, interest of.*

1. A railroad company, in the repair of its road-bed at a point several miles above the plaintiff's mill, caused large quantities of mud to be washed down into a creek, by the process of sluicing, thereby lessening the volume of water used in operating the plaintiff's mill and causing the damage complained of; *whether* the company is liable in such case for consequential damages growing out of the exercise of a right conferred in its charter—*Quere.* But if the power was exercised recklessly and without a due regard to the interests of others, the company would be liable for the resultant injury.
2. The possession and working of the mill by the plaintiff without interference, after as before his conveyance of the land, (upon which was the mill-site,) to a trustee for the benefit of his wife, afford *prima facie* evidence of such a personal interest in its operations as entitles him to maintain his action for the damages he has himself sustained, notwithstanding the trustee may sue for such damages as may affect the land as an inheritance.
3. This action is not for compensation for land appropriated by the company, but seeks remuneration for a special injury occasioned by an alleged wrongful act.

(*Meares v. Com'rs*, 9 Ired., 73 cited and approved.)

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CIVIL ACTION for damages tried at Fall Term, 1884, of BURKE Superior Court, before *Gilmer, J.*

In deference to an intimation of the court that the action could not be maintained, the plaintiff suffered a nonsuit and appealed.

Messrs. P. J. Sinclair and Batchelor & Devereux, for plaintiff.

Messrs. D. Schenck and Reade, Busbee & Busbee, for defendant.

SMITH, C. J. The plaintiff was in possession of a mill for grinding wheat and corn, and had been since 1877, when it was rebuilt, operating the same, on Mill creek, the waters of which, raised by means of a dam, were used as a motive force in propelling the machinery.

In 1879 he executed a deed conveying the tract of land whereof the mill site and the area covered by the pond formed part, to one John T. Reid in trust for his wife Julia C., during her life and in remainder for their son, with certain contingent limitations, not needful to be specified, in the present opinion.

In the year 1882, the defendant company in the repair of their road-bed, some several miles above, at a place known as "Mud Cut," by the use of rubber tubes in the process of sluicing, caused large quantities of loose mud to be washed down which passing into the creek were deposited in the pond, lessening the volume of water therein, diminishing its power, and obstructing the operations of the mill and reducing its capacity to grind to a degree affecting its profits.

The engineer in the service of the defendant estimated that five acres, making a half million of cubic yards, had been thus sluiced or carried away by the current of moving water.

To recover compensation for the damage sustained in

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running the mill, by reason of the large accumulation of mud in the pond, the present action is brought.

Much evidence was offered to show the necessity of removing the mud and by the process of sluicing, as the only available means of making the transit over that part of the road permanent and safe.

The argument before us entered largely into the question of the defendant's right under the charter to do the work and maintain the road in proper repair, without accountability at the common law for consequential damages growing out of the exercise of the right conferred in the charter. The subject is not free from difficulty, but it is not presented in the appeal, and we do not propose to depart from the settled practice which confines our examination to such matters of exception as appear in the record.

After the conclusion of the testimony and the opposing counsel had been heard, the court intimated that the plaintiff had no such estate or interest in the land as enabled him to maintain the action, and thereupon his counsel submitted to a judgment of nonsuit and appealed.

The only inquiry then before us is as to the sufficiency of the plaintiff's interest or property upon the evidence to sustain his claim for damages resulting from the interruptions in the operations of the mill which he was running.

The very statement of the ruling in this form seems to convey convincing proof that it is erroneous. The possession and working of the mill, continued over a period of several years by the plaintiff without interference from any one, in the same manner after as before his conveyance of the land, afford *prima facie* evidence of a personal and direct interest in its operations, the impediment to which produces a remedial injury. It is but a reasonable inference from the plaintiff's possession and use of the mill, that it was with the assent of the trustee, and (in the absence of evidence of any conditions or terms) on his own account

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and for his individual benefit. If he was a mere servant or managing agent for the owner of the property, some proof of this relation should have been produced, for it cannot be inferred from the mere fact that the title was in another. Every person conducting a business is presumed to do so on his own responsibility and for his own advantage.

The ruling of the judge assumes that the testimony shall be taken in its aspects most favorable to the plaintiff, and if the jury would be warranted in finding that the plaintiff was operating the mill for himself and receiving the profits, and these have been cut short in consequence of the act of the defendant, we can see no reason why he may not, if any one else can, seek, through an action, compensation for the damages he has himself sustained in conducting his business.

The plaintiff however has not possession alone of the mill, but, the jury may find upon the evidence, a direct and important interest in its successful operations; and certainly this was sufficient to enable him, so far as this matter is concerned, to maintain his action.

But the court may have so adjudged on the ground that compensation is due only to the owner of the property, so that the result would transfer to the company the easement or right to make this disposition of the removed earth. This is a misconception of the nature and purpose of this action. It does not rest upon the idea of a right acquired by the defendant by payment of compensation to one who thus transfers it, but the damages claimed are the measure of an injury done—remuneration for a special wrongful act and extending no further.

It is not material that the trustee may also sue, for each may obtain redress for the injury to himself, the recovery by the plaintiff for his damages interposing no obstacle to the recovery of such as may affect the land as an inherit-

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ance. These demands are several and distinct, and so may be the actions to enforce them.

Again, the complaint charges that the act of the defendant was unlawful and wilful, that is, that the method adopted for the removal of the mud was unnecessary and injurious, and evidence upon this allegation was before the jury. We do not understand the counsel for the defendant to deny, that, if the power conferred in the charter was exercised negligently and without a due regard to the interest of others, and an injury was suffered in consequence, the company would be exposed to an action for redress in some form, it being an underlying condition of the grant, to use the words of PEARSON, J., in *Meares v. Commissioners of Wilmington*, 9 Ired., 73, that "*the work is done in a proper manner.*" Still more strongly would be the incurred liability for a wilful and reckless act committed in the alleged exercise of the power.

The effect of the action of the court is to withdraw from the consideration of the jury the evidence of the facts upon which the alleged wilful conduct or negligence in the attempted use of the delegated authority, is dependent.

But the pursuit of this inquiry would lead us into a discussion not germane to the appeal, and we will only repeat that upon the evidence it does not affirmatively appear, that the plaintiff has no such interest in the mill and its working as entitles him to seek redress by action.

The non-suit must be set aside and a *venire de novo* awarded, to which end let this be certified.

Error.

Venire de novo.

GRANT v. BELL.

*JAMES W. GRANT, Adm'r, v. JOSEPH J. BELL.

Account and Settlement—Executors and Administrators.

In an action for an account and settlement, the death of the defendant being suggested, his executor comes in and is made a party defendant and moves for leave to file an answer denying that he has assets; *Held*, that the question of assets does not arise here, and the motion cannot be allowed. If plaintiff obtains judgment, it only ascertains the debt which must share in the assets that may come into the executor's hands, according to its dignity, when the estate is settled.

(*Holmes v. Foster*, 78 N. C., 35, and cases cited, approved.)

CIVIL ACTION for account and settlement, tried at Spring Term, 1880, of NORTHAMPTON Superior Court, before Gudger, J.

Messrs. R. B. Peebles and T. N. Hill, for plaintiff.

Messrs. Mullen & Moore, Day & Zollicoffer and J. B. Batchelor for defendant.

MERRIMON, J. This appeal came into this court at October term, 1880, and has been here continuously ever since. See *Grant v. Bell*, 87 N. C., 34, and 90 N. C., 558.

At the present term it is made to appear to this court that the defendant has died since the last term, leaving a last will and testament; that the same has been duly proved, and that R. O. Edwards has qualified as executor thereof.

The death of the defendant is suggested and the executor comes and asks that he be made a party defendant in the place of his testator, and be allowed to file an answer, denying that he has assets, &c.

*SMITH, C. J., did not sit on the hearing of this case.

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It appears from the record that the cause of action survives, and that the suit is not for the recovery of a penalty or damages merely vindictive. The case is a proper one in which to allow the executor to be made a party defendant, and the motion in this respect is allowed.

The proposed answer is not a proper pleading in this action. The question of assets or no assets does not arise in it. If the plaintiff shall obtain judgment for his debt, such judgment will only ascertain his debt, and it will share in the settlement of the estate, according to its dignity, in the assets that are or may come into the hands of the executor to pay the debts. THE CODE, § 1470; *Vaughan v. Stephenson*, 69 N. C., 212; *Dunn v. Barnes*, 73 N. C., 273; *Holmes v. Foster*, 78 N. C., 35.

So much of the executor's motion as asks to be allowed to file an answer must be denied. Let an order be drawn accordingly.

Judgment accordingly.

SCOTT CROSS and others v. JOHN WILLIAMS, Ex'r. and others.

Appeal.

Where an appeal is not prosecuted according to law, the appellee has the right to have a transcript of the record sent up, or a certificate of the clerk that an appeal was taken, and the case docketed and the appeal dismissed. Rule 2, § 7, (89 N. C., 596).

MOTION of defendants to dismiss appeal heard at October Term, 1884, of the SUPREME COURT.

No counsel for plaintiffs.

Messrs. Gray & Stamps, for defendants.

MERRIMON, J. After the call of causes from the sixth dis-

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trict was concluded at the present term, the appellees in this case filed the certificate of the clerk of the superior court of Davidson county, from which it appears that a judgment was rendered against the appellants at the spring term, 1884, of that court, from which they took an appeal to this court, that the case upon appeal for this court was settled by the presiding judge on the 4th day of July, 1884, but no undertaking upon appeal was given. Upon the certificate of the clerk thus filed the appellees moved to dismiss the appeal, as allowed by section 7 of Rule 2.

An appeal is not pending in this court in the sense of the statute, (THE CODE, § 967,) until it is brought up and docketed. As soon, however, as it is taken, as directed by the statute, this court may for good cause upon proper application of the appellant or of the appellee, bring it up by means of the writ of *certiorari*, or allow the appellee to bring up a transcript of the record, or a certificate of the clerk to the effect that the appeal was taken, docket the same and move to dismiss it. The appellant has no right to take an appeal and bring it up, or abandon it at his will and pleasure; he must bring it up in the established course of procedure. The appellee has a right to have the appeal disposed of according to law, and if the appellant will not prosecute it, the appellee may rid himself of it, and have the benefit of the judgment appealed from.

The provision of THE CODE, §967, refers to and provides for dismissing appeals *pending* in this court, that is, to appeals regularly brought up and docketed. But section 7 of Rule 2, refers to and provides for dismissing appeals, in cases where the appellant neglects or refuses to bring up and docket his appeal.

In this case the appellants have failed to bring up their appeal as required by law. Hence, the appellees have the right to move to docket and dismiss it. They have complied with the rule, and the motion must be allowed.

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In NEWSOM v. WILLIAMS, from Davidson.

MERRIMON, J. This case is in all material respects like that of *Cross v. Williams*, and must be governed by it. The motion to dismiss the appeal is allowed.

Appeal dismissed.

ARA BRITTAIN v. S. E. MULL, and others.

Clerk of Superior Court—Jurisdiction—Special Proceedings.

1. The office of probate judge is abolished and the duties thereof now devolve upon the clerk of the superior court, and in such case he has a special jurisdiction which is distinct and separate from his general duties as "clerk of the court."
2. Where issues of fact are joined before the "clerk" in the exercise of his special jurisdictional powers as a distinct tribunal, the issues must be transferred to the "superior court"—another jurisdiction—to be tried, and when tried must be *remanded* to the clerk; and so also, where an appeal is taken in like cases from his decision upon a question of law, the judge decides it and remands the case.
3. But the exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal, as allowed by the statute.
4. Special proceedings ordinarily are proceedings in the "superior court," and where in such cases issues of fact are raised, the clerk transfers them to the civil issue docket for trial by jury at term; or where issues of law are raised and decided on appeal by the judge, at term or in vacation, the issues so found are not *remanded* to the clerk—the whole proceeding being in one record and in the same jurisdiction; but the court, through the clerk, will proceed accordingly as the statute directs; *Hence*, in a special proceeding for dower, as here, the issues found or decisions of law made, are not *remanded*, but the court, through the clerk, proceeds accordingly to law.

(Mr Justice ASHE dissenting).

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PROCEEDING for dower heard at Spring Term, 1883, of BURKE Superior Court, before *Gudger, J.*

The plaintiff sues as the widow of James Brittain, who died intestate in October of 1876, and the defendants are his heirs-at-law. The plaintiff brought her action in the superior court before the clerk thereof, to obtain dower in the lands of her deceased husband. To this end she filed her petition and the defendants answered the same. Issues of fact were raised by the pleadings, and the clerk transferred the case to the civil issue docket for the trial of the issues at the ensuing term of the superior court.

The court, upon application of the defendants, allowed them to substitute an answer for the original one, which, as was suggested, had been lost or mislaid. It seems, however, that it was afterwards found, as it appears in the record.

At a term subsequent to that at which the issues were tried, the plaintiff moved,

- "1. To strike papers from the file.
2. To remand cause to the probate court.
3. To have dower assigned to the plaintiff."

The court denied these motions, and the plaintiff appealed to this court.

Messrs. Sinclair and Batchelor & Devereux, for plaintiff.

Mr. G. N. Folk, for defendants.

MERRIMON, J., after stating the above. It should be observed that section 17, of article four, of the constitution of 1868, prescribing certain jurisdiction of the clerks of the superior courts, is not retained in the constitution as amended by the convention of 1875. Such clerks now have no jurisdiction prescribed by the constitution. And the office or place of judge of probate is abolished by THE CODE, §102. There is now no judge of probate, so denominated.

So that, the special jurisdiction of clerks of the superior

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courts, and as well, their general duties as clerks, are now prescribed by statute, except so far as general principles of law, not inconsistent with such statutes, may apply and govern them.

Their special *jurisdictional duties* and power are distinct and separate from their general duties as clerks of the courts to which they belong; but in respect to their jurisdictional functions, they are in convenient relation to their respective courts. Indeed, they are in effect constituted courts of limited jurisdiction to the extent that jurisdictional functions are conferred upon them apart from their general duties as clerks, and as such courts, they are in immediate relation with the superior courts of which the clerk so exercising jurisdictional power is clerk.

The purpose of the statute seems to be to charge such clerks with such special jurisdictional authority, in order to avoid a multiplicity of officers, and facilitate the decisions of questions of law arising in matters before them, by a judge of the superior court, and the trial of issues of fact so arising, under the supervision of such judge, and as well to economize in respect to time and costs.

The jurisdictional powers thus conferred on clerks apart from their general duties, is confined mainly, though not entirely, to matters of probate. THE CODE §103 prescribes such jurisdiction; § 108 prescribes the powers the clerk may exercise in aid of his jurisdiction; § 112 prescribes the records he must keep in books separate and distinct from the records of the superior court; and § 116 prescribes how issues of fact raised in matters so before the clerk shall be tried in term time, and questions of law so decided by the clerk and excepted to, shall be decided by the judge in or out of term time.

If issues of fact are joined before the clerk in such matters, these and the pleadings upon which they arise must be *transferred* (§ 116,) to the superior court, that is, to another jurisdiction, in such respect to be there tried. And when

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the issues are so tried, the court remands the same and the pleadings or papers with the findings of the jury upon them, and the clerk will then proceed with the matter according to law. This provision has reference to issues of fact.

If the clerk in any such proceeding shall in matters of law make a decision excepted to in a proper way, the party excepting may *appeal* (§116) to the *judge* of the superior court in or out of term. The judge will hear such appeal and decide the questions of law presented by it, and then remand the matter, including his decision, to the clerk, unless his decision shall be excepted to and an appeal be taken to this court. This court will decide the questions presented by the appeal so taken, and direct the judge below, if his decision shall be affirmed, to remand the matter to the clerk, or if his decision shall be reversed or modified, direct him to reverse or modify his decision accordingly, and then remand the matter.

The statute does not prescribe how the judge shall send the issues found in term, or his decisions made in or out of term, to the clerk; but general principles of law warrant the procedure we have indicated above.

It will be observed that what we have said applies to matters wherein the clerk exercises jurisdictional authority as a separate tribunal, apart from his general duties as clerk of the superior court.

But the clerk of the superior court is charged with the exercise of important judicial powers under the Code of Civil Procedure, in the exercise of which he represents and acts as and for the court. Indeed, his action in this respect, is that of the court; the court exercises its power through him, supervising and controlling his action in the way prescribed by the statute. Certain of the court's powers, specified, are exercised by the clerk, and his action, when taken, stands and prevails as the action of the court, unless a party interested shall except thereto in any material respect, in which

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case, the judge interposes in the way prescribed by the statute. The clerk is allowed to do certain things in the course of procedure in the action that prevails, unless the judge shall set his action aside, or correct and modify it in the case and manner prescribed by the statute.

THE CODE, § 132, provides that when jurisdiction or power is conferred in respect to the superior court, or duties are imposed, the term "court" implies the clerk of that court, unless otherwise especially stated, or reference is made to a regular term of the court, in which case the judge alone is meant.

THE CODE, § 251, likewise provides, that the clerk shall have jurisdiction to hear and decide all questions of practice and procedure, and all other matters whereof jurisdiction is given to the superior court, unless the judge of that court, or the court at a regular term thereof be referred to; but § 252 allows any party to appeal from any decision of the clerk in such respects, without any undertaking for costs, to the judge, and his decision at once prevails as the act of the court. That is, the clerk acts as and for the court, unless the judge is specially required to act, or the action is to be taken in term time, in which case the judge is to act for himself. What is done by the clerk stands as the action of the court, if not excepted to. The statute requires the court to do certain prescribed things through the clerk, in the exercise of its jurisdiction, and there is no dual or divided jurisdiction; it is one court and one jurisdiction, and the clerk must do certain things prescribed by the statute to facilitate and expedite the procedure of the court, and what he does, unless excepted to, stands as the action of the court; it fails or is modified only by the express sanction of the judge. In the ordinary course of procedure in civil actions under THE CODE as it now prevails, the clerk does not exercise power in respect to pleadings and practice to any considerable ex-

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tent, because, questions arising in such matters arise mainly in term time, when the judge must act directly.

What we have thus said applies in the case of special proceedings as well as in other respects. These proceedings are begun in the superior court in vacation time before the clerk, as provided by THE CODE, § 278, and they are proceeded with as prescribed in Title VIII of the Code of Civil Procedure. The whole proceeding is in the court and has its sanction. The clerk has not jurisdiction of such proceedings separate and apart from his general duties as clerk, as in matters of probate and the like, as provided by THE CODE, § 103. "The provisions of the Code of Civil Procedure are applicable to special proceedings except as otherwise provided." THE CODE, § 278. Such proceedings are begun by summons, unless the matter be *ex parte*; there must be complaint or petition; and other appropriate pleadings follow, as in other cases. The clerk has, as in civil actions, his certain duties to perform as and for the court. If any party excepts to his decision in matters of law, he may appeal at once, without any undertaking for costs, to the judge, and upon hearing the appeal and deciding the questions of law presented by it, as prescribed by the statute, THE CODE, § 255, he then "*transmits* his decision in writing, endorsed on or attached to the record, to the clerk of the court," and such decision becomes part of the record of the court in the proceeding, and the clerk will proceed with his further duties in that behalf according to law." If issues, both of law and fact, or issues of fact only, are raised before the clerk, he shall *transfer* the case to the civil issue docket for trial of the issues at the ensuing term of the superior court." THE CODE, § 256. Let it be noted here that the clerk is required to "*transfer the case to the civil issue docket for the trial of issues*"—that is, to the civil issue docket in the same court and jurisdiction—not to the superior court, another jurisdiction, as required by THE CODE, § 116,

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in cases where the clerk has a jurisdiction separate and distinct from his general duties. The reason why the clerk is more active in exercising judicial powers in special proceedings as and for the court, is, that such proceedings are prosecuted to a large extent out of term time, and the judge in person is not required to act in many respects.

When the questions of law arising in special proceedings are decided by the judge, or issues of fact are tried in term time, it is not necessary or proper to remand or transmit the decision of the court, or the findings of the jury, or to direct a *procedendo* to issue, to the clerk of the court, because the whole action and all the proceedings are in the court—in the same jurisdiction, and there is but one record; the clerk sees, by reason of his relation to the court as clerk, what is done, and it is his duty to move forward upon such decision of the court and the findings of the jury, in the further disposition of the proceeding, unless in his further action, he shall decide questions of law and a party shall except to his decision; in which case the party excepting may again appeal to the judge.

An impression seems to prevail to some extent with the legal profession, that the clerk of the superior court has jurisdiction in respect to special proceedings distinct from the superior court, and there may be some decisions of this court that seem by inadvertence to so imply. Such impression is erroneous. These proceedings unless otherwise specially provided by statute, are as much in the superior court as a civil action. They are in one and the same court and jurisdiction.

This is so in respect to the assignment of dower. The CODE, § 2111, provides that “a widow may apply for assignment of dower by petition in the superior court, as in other cases of special proceedings.” And it so provides in respect to partition. THE CODE, § 1892. It is so also, in respect to

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selling lands to make assets to pay the debts of deceased debtors, THE CODE, § 1436; and in other like cases.

The case before us is an application by a widow for dower. She brought her action in the superior court before the clerk thereof; the pleadings raised issues of fact, and the clerk transferred the case "to the *civil issue docket* for trial of the issues at the ensuing term" of that court. At a subsequent term the issues were tried and found in favor of the plaintiff. And at a term subsequent to that, the plaintiff moved that the case be remanded to the probate court; or, that the court assign dower to the plaintiff.

The first motion was obviously improper, because there is no probate court so denominated, and the clerk, in the exercise of his jurisdictional functions, had no jurisdiction of the matter; and likewise, because the whole proceeding was in the superior court as one proceeding having one record, and it would be absurd for the court to undertake to remand a case to itself!

The second motion could not be sustained, because, as to the assignment of dower, the court through the clerk, out of term time, in the course of procedure, adjudges whether or not the plaintiff is entitled to dower, and grants the order directing the assignment, as provided in THE CODE, § 2113. If either party should except to the decision of the clerk in respect to matter of law, the party excepting might appeal to the judge.

The motions of the plaintiff were unnecessary, indeed, improper; the issues having been passed upon by the jury and their finding entered of record, the clerk, seeing this, in the course of procedure in the proceeding, ought to have taken further action in that behalf according to law, without any special instruction from the court. The findings of the jury put the issues of fact out of his way, and accepting the facts in issue as found by the jury, he should have taken further action.

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The first motion made by the plaintiff is so indefinite as to be unintelligible. It does not indicate what papers she wishes stricken from the files, and we cannot see how it was, in any aspect of the case, material. Parties should always make their motions and their exceptions involving them, intelligible, else, this court cannot act upon them. We cannot supply facts to complete them; we are governed strictly by what appears in the record.

Judgment affirmed. Let this opinion be certified to the superior court, to the end that that court may proceed according to law.

No error.

Affirmed.

GAVIN H. CLARK v. WILMINGTON & WELDON RAILROAD COMPANY.

Railroad, suit against for ejecting passenger from train.

In a suit against a railroad company for damages alleged to have resulted from the action of the conductor in ejecting the plaintiff from the train, it appeared that the plaintiff got on the train at a certain station to go to the next station about four miles distant, without a ticket or money to pay his fare. About twenty-five other persons took the same train to go to the same place, one of whom, as it was shown on the trial, promised to pay the plaintiff's fare before they got on the train, but he did not sit in the same car with the plaintiff. (In taking up tickets and collecting fare from passengers, the conductor was told by the plaintiff that he had neither money nor ticket, but would get the money if allowed to go into the rear car and see a fellow-passenger. The conductor said "I have not time to wait, you must get off," and thereupon pulled the bell-rope, stopped the train, and put the plaintiff off. The train had made about half the distance between the stations;

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Held that the plaintiff was entitled to recover.) The conductor should have allowed him a reasonable opportunity to pay his fare; but an offer to pay (and declined by the conductor) after the train was stopped will not entitle him to return to his seat.

(Mr. Justice MERRIMON, dissenting.)

CIVIL ACTION for damages tried at Spring Term, 1884, of HALIFAX Superior Court, before *Avery, J.*

The plaintiff sues to recover damages for ejection from defendant's passenger car.

On the 14th of June, 1883, the plaintiff got on the defendant's train at Whitaker's depot to be carried to Battleboro depot, about four miles distant. The fare between these stations was twenty-five cents, and when about half way between them, the plaintiff was ejected from the car by the conductor.

It was in evidence that before the train reached Whitaker's the plaintiff applied to one Powell for money to pay his fare, and Powell told him he would pay it on the train; and just before the train reached the depot he made a similar application to one Braswell who also was waiting to take the train, and Braswell also told him he would pay plaintiff's fare on the train. This evidence was objected to by defendant, but admitted by the court, and defendant excepted.

On boarding the train, Braswell took a seat in the rear car, the plaintiff in the one just ahead of it, and Powell in the same car with plaintiff or in the one ahead of it.

When the conductor came around to collect the fare, the plaintiff told him that he had neither ticket nor money with him, but that he would get the fare from a gentleman in the rear car, if he (the conductor) would allow him to do so. The conductor replied "you must get off—I have not time to wait for you, I have something else to do," and immediately pulled the bell rope, stopped the train, and ejected

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the plaintiff, his train hands being present and able to enforce orders. There was no force used in the ejection except the order of the conductor (in the presence of his assistants) to leave the train.

When the conductor called on the plaintiff for his ticket or fare, he was on his way from the car where the plaintiff was to that where said Braswell was; and said Braswell was able, ready and willing to pay said fare. He did not know the plaintiff was ejected.

While the plaintiff was being ejected and on the lower steps of the car, said Powell offered to pay plaintiff's fare to the conductor, who declined to receive it.

The defendant asked the court to charge the jury as follows:

1st. "When the conductor demanded of the plaintiff his ticket, and he tendered neither ticket nor money, the conductor had the right to eject the plaintiff."

2nd. "There is no evidence that the conductor prevented or forbade the plaintiff from going to Braswell."

His Honor refused so to charge and the defendant excepted.

The only evidence on this point was that of the plaintiff himself, and of one William Stephens, introduced by the defendant. Plaintiff testified as follows:

Got on defendant's cars at Whitaker's, June 14th, 1883, but had no ticket. Conductor asked him for his ticket; told him he had none; conductor said "you must get off the train, then." Plaintiff said "if you will allow me to go into the other car, I will get money to pay the fare;" conductor ordered him off the train; Isaac Powell then offered to pay the twenty-five cents, which was the fare; conductor refused to take it, and put him off the train; did not go to the other car because the conductor did not give him time; conductor was going to the rear of the train and plaintiff proposed to go to next car in rear.

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On cross-examination he said he had been drinking but was not drunk—was sick from effects of liquor—conductor did not put his hands on him—did not try to get to the other car, but could have gone in there if conductor had let him—did not go because brakeman could have put him off.

Twenty-five or thirty passengers got on at Whitaker's for Battleboro. Conductor said "you have to get off," and plaintiff told him before he rang the bell that he could get the fare from a man in the other car, but did not go to other car because conductor said "you have to get off."

William Stephens testified that he was and had been for five years a brakeman on said conductor's train; that conductor was going through and got to plaintiff and said, "give me your ticket," and plaintiff said, "I have'n't got a ticket," and conductor said, "give me your ticket or your fare or I'll put you off; make haste, I have'n't time to wait on you, I have something else to do;" and plaintiff said, "I have'n't got the money or a ticket either." Then the conductor rang the bell, stopped the train, and helped the plaintiff off. Powell then said, "I will pay your fare," and the conductor remarked, "you are too late, go and attend to your own business." The train was moving off then, and the witness heard the plaintiff say something, but did not hear what.

The defendant asked the court to charge that plaintiff could not recover upon the testimony offered in his behalf (as set out above), but this was refused and defendant excepted.

The only other evidence for plaintiff was that of Braswell, who testified that plaintiff applied to him to pay his fare a few moments before the train came up, which he agreed to do, and would have done if he had been applied to for it, but no one called on him for it. The exception of defendant to this evidence was overruled. And upon cross-examination he stated that he did not think he was in same

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car with plaintiff, and did not see plaintiff put off the train; that plaintiff was not a "fussy man."

His Honor, among other things, charged the jury, "that the conductor was not bound to go into the other car to get the fare from Braswell, but if Braswell had money and was ready and willing to pay the fare of plaintiff, and plaintiff told him before he stopped the car and started to eject him, that a friend in the next car would pay his fare, then the conductor ought to have allowed plaintiff a reasonable time to get the fare." Defendant excepted.

"If the conductor started at the car where plaintiff was, and was passing through the train to collect fare or tickets, it was reasonable to allow plaintiff to go to the next car in rear to procure the money to pay his fare; and if the plaintiff did notify the conductor that a friend in the next car in rear would pay his fare, and the conductor stopped the train without allowing him time to go to the next car, and then ordered the plaintiff to get off, having at the time power to enforce obedience to his commands, then the plaintiff is entitled to recover, and they should respond to the first issue—yes." Defendant excepted.

"If the plaintiff failed or refused to pay his fare when called upon by the conductor, and did not propose to get the money from another passenger, and there was no offer to pay the fare till the plaintiff was on the steps of the car and was being ejected, then the conductor was not bound to receive the fare at that time, and the jury would respond to the first issue—no."

Verdict for the plaintiff; judgment; appeal by defendant.

Messrs. Mullen & Moore, for plaintiff.

Messrs. Day & Zollicoffer, for defendant.

SMITH, C. J. The plaintiff, while at Whitaker's station, on the defendant's road, awaiting the arrival of the train,

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on which he intended to take passage for Battleboro, a station four miles distant, and being himself without money, made arrangements with two others, Isaac Powell and T. P. Braswell, who were also going on same train, in which each agreed to pay his fare of twenty-five cents, the charge between those points.

When the train came, all three, with twenty or more others, entered it, the plaintiff taking a seat in the forward coach, Braswell in that next behind, and Powell in that where the plaintiff was, or one next in front.

When the conductor was passing through the coaches, taking up the tickets and collecting fares, from front to rear of the train, he came to the plaintiff, who said he had neither ticket nor money, but would get the fare, if allowed to go to the coach behind, from a gentleman sitting there.

The conductor refused to do so, saying, "you must get off. I have not time to wait for you. I have something else to do." The train was then about half way between the stations, moving at a rapid rate, when the conductor stopped the train and compelled the plaintiff to get out.

Braswell would have advanced the money and paid the fare upon application. As the plaintiff descended from the coach and was on the lowest step, Powell offered to pay the fare, but the conductor declined to receive it, saying, "you are too late, go and attend to your own business."

In expelling the plaintiff there was no actual force employed against his person, but the order was given, and assistants were present to execute it, and the plaintiff submitted.

The action is to recover damages for this ejectment of the plaintiff, and the sole question raised by the appeal is, whether under the circumstances the conductor had a right to put the plaintiff off the train.

An instruction was requested for the defendant, in the charge given to the jury, in these words:

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"When the conductor demanded of the plaintiff his ticket, and he tendered neither ticket nor money, the conductor had the right to eject the plaintiff."

This was refused, and instead the jury were directed as follows:

"The conductor was not bound to go into the other car to get the fare from Braswell, but if Braswell had money and was ready and willing to pay the fare of the plaintiff, and plaintiff told him before he stopped the train and started to eject him that a friend in the next car would pay his fare, then the conductor ought to have allowed plaintiff a reasonable time to get the fare."

The whole controversy is involved in these two instructions, the one refused and the other given.

There can be no question of the right of the officer, in charge of a train of passenger coaches, to remove any one who has entered and refused to pay his fare or produce his ticket, as evidence of its having been paid to some authorized agent of the company, unless he is travelling with its permission without.

Such refusal, in opposition to the rules of the company, presents a case which warrants the officer in charge to require such intruder to leave the train, and if necessary, to use such force as is sufficient to accomplish his ejection. Nor, when the officer has stopped the train, and he is descending the steps and about to pass out, will a tender of the fare entitle him to return to his seat. He forfeits his right of carriage by such misconduct by breaking his own contract to pay when called on, and it is not regained by his repentance at the last moment, and after he has caused the inconvenience and delay to the company by his wrongful act. The adjudications fully recognize this authority in the carrier, and it is necessary to prevent imposition upon it. Ang. on Carr. § 609, note A; Thomp. Carr. Pass. 340. note 5.

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Where there has been no refusal to pay the fare and the obligation not disputed, but for some reason, such as the mislaying of the ticket, or loss of pocketbook in which the money is kept, or other adequate cause which prevents a prompt response to the conductor's demand, it is but reasonable that an opportunity should be allowed the passenger to search for what is mislaid or lost, or to provide other means of payment, where the delay does not interfere with the regular duties of the officer in charge.

The delay in the present case would have been momentary, if indeed, any had been occasioned, in permitting the plaintiff to precede the conductor in passing into the next coach and getting the money in time for the call on Braswell or before Braswell had been reached. Instead of complying with this request, made in good faith, the conductor arbitrarily and instantly rang the bell and expelled the plaintiff, producing an interruption in the movement of the train that would have been rendered unnecessary if a brief time had been given to the plaintiff to get the money promised him.

This was a harsh exercise of power, injurious to the plaintiff and needless in the protection of the interests of the company.

The cases that uphold the right of the carrier company summarily to expel from its train a passenger who does not produce his ticket or pay when called on, as required by its regulations, are all, so far as we have examined, cases of a denial of the right to demand the fare, or a refusal to pay it upon some untenable ground, so that the conductor must submit or enforce his authority against the resisting passenger and prevent his riding unless he does pay.

The facts of this case do not bring it under the operation of the rule applicable to those who persistently and wrongfully resist the demand of the conductor, acting under directions of his principal and within the sphere of his neces-

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sary powers, for the plaintiff acquiesces in the demand of his fare, and merely proposed to pass into an adjoining car to obtain the money, promised under a previous arrangement with a fellow passenger.

This view of the relations between the carrier and passenger is sustained by recent decisions.

In *Maples v. N. Y. & N. H. R. R. Co.*, 38 Conn., 557, the plaintiff had mislaid his commutation ticket, and could not at the moment when called on by the conductor, produce it, as he was, by the regulations of the company and the conditions of the issue of such ticket, required to do, while the conductor knew he had one and that the time limited therein had not expired. The conductor, regardless of the explanation and following the letter of his instructions, demanded the fare, and it not being paid, forced the plaintiff to leave the train. For this expulsion the plaintiff sued, and PARK, J., delivering the opinion in the supreme court, thus declares the law:

"The plaintiff was entitled to a reasonable time to find it (the ticket). The contract requires him to show his ticket to the conductor, but he was not bound to do so immediately when required. * * * Under such circumstances the plaintiff was entitled to ride as long as there was any reasonable expectation of finding it during the trip"

In *Hayes v. N. Y. Cen. Railroad Co.*, decided in the supreme court at the general term held in October last, reported in vol. 30, No. 24, Alb. Law Journal of Dec. 13th, 1884, the plaintiff had a ticket but failed to find and exhibit it to the conductor when called on; whereupon the bell was rung, the train stopped, and the plaintiff required to leave. Before the train came to a halt the plaintiff found his ticket and offered it to the conductor, who nevertheless compelled him to get off.

The court say, MERWIN, J., speaking for all the members: "If the ticket of the plaintiff was mislaid, and he

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in good faith was trying to find it, he was entitled to reasonable time to enable him to do so, if he could, and if in case of failure to find it, after such reasonable opportunity, he was willing and ready to pay his fare, the conductor had no right to put him off." See *Railroad v. Garrett*, 8 Lea, (Tenn.) 438.

It is contended however that the short distance to be run over by the train before reaching the station at which the plaintiff was to debark did not admit of delay and rendered necessary prompt action on the part of the conductor, and it was the plaintiff's own fault to enter the coach without a ticket or the means of payment when the fare was required of him.

It does not appear in the case that prepayment of fare was necessary, and it is obvious that no appreciable time would have been lost in giving the plaintiff opportunity to call on Braswell and get the money to pay his fare. If this were a mere pretence, and such seems to have been the assumption on which this precipitate action of the officer was taken, a moment would have revealed it, and then the ejection would have been fully warranted.

The defence set up is an assertion of the right to remove from a train any passenger, who may not be ready at once to exhibit a ticket or pay his fare, notwithstanding he has the means at command by passing into an adjoining coach, and only asks time to do so. This rigid rule enforced would require every one to have possession of his own ticket, or the friend who has it to be near by, at the hazard of expulsion, if he did not.

In all cases a reasonable indulgence should be shown a passenger in his effort to comply with the rules of the company, and what is reasonable must be determined in connection with surrounding circumstances and in view of the facts of each case.

We think the plaintiff's request was reasonable, and that

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the hasty and precipitate action of the conductor was in excess of the authority with which the law armed him.

The exceptions to the evidence are not tenable, for its only office was to show that the plaintiff had provided means to pay his fare, and did not intend to trespass upon the rights of the company.

In some of the states the right to eject for non-payment is restricted, so far as to require it to be at some station and not capriciously at any point, which might be at some very inhospitable spot endangering health if not life.

There is no error and the judgment must be affirmed.

MERRIMON, J., (*dissenting*). I do not concur in the judgment of the court in this case, and it being a case of some practical importance, I will state the grounds of my dissent.

One of the chief purposes of railroads is orderly, safe and prompt expedition in travel. It is the duty of the owners of such roads, whether persons or corporations, to provide and employ the best means in all respects to accomplish this important end. To do this, requires an immense outlay of capital, and very thorough organization and promptitude. The social and business interests, the spirit of the age in which we live, and our progressive civilization demand and require such expedition, secured by such means; and the law recognizes and provides for it, and for in its encouragement, in a vast variety of ways. It holds the owners of such roads to a high measure of amenability and responsibility. It likewise requires those who travel upon such roads and thus accept their benefits, to pay promptly, and just compensation therefor, to be orderly and reasonably prompt in all things about such travel, and to submit to reasonable regulations and restraints in connection therewith, in order that the convenience, comfort, safety and social business interests of the passenger may be cared for

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and promoted, directly and indirectly, and the general purpose mentioned, subserved. There are mutual duties and obligations between such owners and those who travel upon their roads, and these, in their extent, are just as binding on one side as the other.

Among the duties of a passenger over railroads, is that to get on the train, carrying passengers, at proper times and places designated, with reasonable promptness—that is, as quickly as this can be done safely, employing the facilities provided for doing so, these being safe.

Another duty in that connection is, that he shall pay his fare for so travelling before he goes on the train, if this shall be required, taking evidence of this fact, usually called a "ticket." This is reasonable with a view to promptitude, as well as business order. Or, if he does not do so, he should go on the train prepared with the money to pay his fare with reasonable promptness when the conductor shall call for it. He must have the money in hand for this purpose, or so near about him in the hands of another, as that he will not delay the conductor unreasonably under the circumstances, and thus derange the course of business in collecting fares and in other respects on the train while it is rapidly moving on the way. It is but just that the passenger should be reasonably prompt in these respects, and if he is not, that he be put off the train as an intruder obstructing the course of business, and impairing the convenience, safety and expedition of other passengers, as well as interfering with the rights of the owners of the road, and those of others not on the train depending more or less upon the promptitude of the train in reaching its destination. The authorities on the train must be circumspect, careful and prompt to keep time and secure expedition. It is unreasonable in every view, as it seems to me, to allow the passenger, without money, under the circumstances in this case, as of right, to go from one car to another on the train while

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moving on the way, to get his "fare from a gentleman in the rear car."

These views seem to me just and reasonable, looking at the rights of the individual passenger, the rights of all other passengers on the train, the rights of the carrier and the general good of the public as subserved by public carriers.

In this case, the plaintiff got on the defendant's passenger train at one station on its road to ride to another four miles distant. He did not prepay the fare, and he went on the train knowing that he did not have the money with which to pay it when called for, nor did he pay it when called for by the conductor in the course of collecting fares. If this were all, it is obvious that the conductor had the right to put him off as an intruder.

But while saying that he had no ticket or money to pay the fare, he said "he would get the fare from a gentleman in the rear car, if he (the conductor) would allow him to do so, but he did not say that any gentleman had promised to pay it.

Was it the duty of the conductor to give him time, as of right, to go into the rear car, and get the money? I think not. The train was the passenger train, moving, it must be taken, at a rapid rate of speed; the distance was four miles; about half that distance had been passed over before the conductor, in the course of his duties in collecting fare, reached the plaintiff; the plaintiff had no ticket or money to pay the fare. The presumption, as to the conductor, it may be fairly said, was that the plaintiff would pay the fare until he refused, or failed to pay—then the presumption was against him. He was bound to know the necessity of reasonable promptitude on his side as to the fare. He did not have the money to pay it. Then why did he not get it before he got on the train? Failing in this, why did he not get it after he got on the train, and have it ready? If for any reason he was

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not to be trusted with it, why did he not get near to the person who was to pay it for him, so as not to create delay, or strong suspicion that he did not intend to pay it? It was his plain duty to do this. As he did not, in the absence of assurance other than his own declaration—"that he would get the fare" in the way indicated, unsupported by the circumstances, but in fact discredited by them, there was strong evidence for the inference on the part of the conductor that he was an intruder, intending to get the ride without paying for it. It does not appear that he was responsible, or that the conductor knew him, and that he was trustworthy, if such circumstances could, in any case, be urged in his favor.

But it is said, that nevertheless, the conductor ought to have given him time to go in the rear car and get the money to pay the fare. The conductor had no reasonable assurance that he would or could get it—the circumstances and facts before him went strongly to show that he would not. If the conductor had allowed him to go into the rear car, before he could have done so and returned to the conductor in the course of his business, or failing to get the money, before the conductor could have put him off, the station to which he was going would probably have been reached, and he would have gotten his ride without paying for it, and could have laughed at the success of his trick and the unbusiness-like credulity of the conductor.

There was no time for such delay in this, or any like case on passenger trains. A rule that allows a passenger to go from one car to another to get money to pay his fare, under the circumstances of this case, is, in my judgment, unreasonable. Such a rule affords opportunity for frequent successful frauds upon public carriers where parties, and often times irresponsible parties, want to travel short distances. In a few minutes the train passes from one station to an-

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other, and the collection of fares must be prompt and passengers required to prepare for prompt payment. The train cannot be delayed to collect fares before it starts on the way; this would delay and impede travel in a way not allowable. The more reasonable and just rule would be to require the passenger to be prepared, especially when the distance is short, as in this case, to pay his fare promptly, or, failing to do so, to run the hazard of being put off the train.

If one passenger has the right, as allowed in this case, two, a half dozen, have the same right, and all might claim and exercise it!

It seems to me, with all due deference to my brethren, that there is no real necessity for the rule as laid down by the court in this case; that the just and reasonable rule in such cases is, that the passenger must prepay his fare, and have his "ticket" showing the fact, or he must have the money in hand to pay it on the train with reasonable promptness when called for, or in the hands of another, so near to him as not to delay the conductor in collecting it.

It is true that a witness said on the trial, he would have paid the plaintiff's fare, if he had been called upon on the train in a rear car, but the conductor did not know this fact. It was not made known to him. The defendant did not say that the witness had promised to let him have the money, and the circumstances, as I have indicated, went strongly to show that he would not. The rule of law must be applied in the light of the facts as they appeared to the conductor, and the true rule is such as to secure justice to the passenger and the carrier alike, in view of the facts as they appeared at the time.

The conductor seems to have been abrupt, insolent, rather than arbitrary. We cannot see all that may have prompted his action. Impoliteness is not to be commended, but it cannot change the rule of law applicable here. Conductors ought to be reasonable, just, patient, polite to all, and gen-

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lemen under all circumstances; my observation is that they generally are so. If, sometimes they are not, it is to their discredit, in the estimation of good people, and to the injury of their employers.

PER CURIAM.

Judgment affirmed.

 STATE v. A. L. WAGNER.

Appeal Bond, insufficiency of.

An appeal will be dismissed, on motion of the appellee, where the surety to the undertaking fails to justify that he is worth *double* the amount specified therein, unless there be a waiver in writing on the part of the appellee, or unless a sum of money, in lieu of an appeal bond, is deposited with the clerk by order of the presiding judge. Cases in which a waiver will be presumed, reviewed by MERRIMON, J.

(*Harshaw v. McDowell*, 89 N. C., 181; *McMillan v. Nye*, 90 N. C., 11; *Hancock v. Bramlett*, 85 N. C., 393; *Bryson v. Lucas*, *Ib.*, 397, cited and approved).

PROCEEDING in Bastardy heard at Spring Term, 1884, of WATAUGA Superior Court, before *Shipp, J.*

This proceeding was instituted before a justice of the peace by one Mary L. Tice, upon whose complaint and affidavit, that the defendant was the father of a bastard child begotten upon her, the defendant was arrested, tried and adjudged to be the father of the child, and to pay a certain sum per month for its support. The case was brought to the superior court by a writ of *recordari*, and the defendant moved to dismiss the proceeding for certain causes—not material to be stated in order to an understanding of the opinion of this court—and the motion was refused.

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Judgment for the plaintiff, from which the defendant appealed. In this court a motion to dismiss the appeal was made upon the grounds stated in the opinion.

Attorney-General, for the State.

No counsel for the defendant.

MERRIMON, J. The appellee moved to dismiss the appeal upon the ground that the surety to the undertaking had failed to make affidavit that he was worth *double* the sum of money therein specified; and it so appeared.

The defect is fatal to the appeal, unless there has been a *waiver* of the undertaking, in writing, on the part of the appellee, or unless a sum of money in lieu of the undertaking was deposited with the clerk by order of the court. THE CODE, §§ 552, 560; *Harshaw v. McDowell*, 89 N. C., 181.

No such deposit appears to have been made, and we find no such waiver in writing, in or out of the record. At one place in the record we find this writing—"Bond fixed at \$25; *bond filed*," but it does not appear that the court saw or approved it. It cannot be presumed that the court saw it, because in the orderly course of business the clerk takes the undertaking; it is not necessary that the court should do so. It must sufficiently appear affirmatively that the court received and approved the undertaking, in which case the presumption arises that the appellee was present and assented to the entry of approval—he being in court is presumed to see and assent to such entry, nothing appearing to the contrary. *McMillan v. Nye*, 90 N. C., 11.

In *Hancock v. Bramlett*, 85 N. C., 393, the entry on the record was—"bond fixed at \$25; filed and *approved*," and this was held a sufficient waiver in writing. There, the Chief Justice said: "The acquiescence of the appellee in its sufficiency must therefore (because the undertaking was accepted in open court) be assumed, and consequently a

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waiver of his right to make the objection in this court." And the court, in that case, went as far as we feel at liberty to go in upholding the waiver in writing recognized by the statute. "Filed and approved" imply that the court approved the undertaking in open court, and that is very much more than is implied by the words, "bond filed."

In *Bryson v. Lucas*, 85 N. C., 397, the court held, the undertaking not being justified, that an entry thereon of the words, "the within bond is good," was not a compliance with the statute prescribing how appeals shall be perfected. There, Mr. Justice ASHE, in distinguishing it from *Hancock v. Bramlett*, said in respect to the latter case: "In that case the presiding judge in the case on appeal states that the bond fixed at \$25 is 'filed and approved,' and it was presumed that the bond was taken in open court under the supervision of the judge. But this bond is approved by the clerk, it may be privately, when the appellee had no notice of its being filed or any opportunity to object to its sufficiency."

The purpose of the statute is to protect the appellee in respect to costs. He has a substantial interest in the undertaking, upon appeal, and it cannot be dispensed with without his consent in writing, unless a sum of money be deposited with the clerk by order of the court in lieu of the undertaking. The statute is careful to provide, in strong, peremptory and exacting terms, that the appeal shall be *ineffectual for any purpose* unless perfected in the way prescribed in it. The language is plain and mandatory, and very little is left to construction. The appellee has the substantial right under the statute to insist upon a substantial compliance with it in all respects. And it is our duty to uphold his right when he demands that we do so in a proper case.

The motion to dismiss the appeal must be allowed. It is so ordered.

Appeal dismissed.

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STATE v. ELIAS BUTTS.

Appeal Transcript of Record.

The transcript of record on appeal should be drawn in accordance with Eaton's Forms. The transcript in this case is so imperfect that the court *ex mero motu* ordered a writ of *certiorari* to issue.

(*State v. King*, 5 Ired., 203; *Sudderth v. McCombs*, 67 N. C., 353; *State v. Jones*, 82 N. C., 691; *Howell v. Ray*, 83 N. C., 558; *State v. Gaylord*, 85 N. C., 551, cited and approved.)

INDICTMENT for cruelty to animals, tried at Fall Term, 1884, of GREENE Superior Court, before *Avery, J.*

Defendant appealed.

Attorney-General for the State.

No counsel for defendant.

MERRIMON, J. The transcript of the record in this case is so imperfect, that we are not at liberty to decide the questions of law intended to be presented by the exceptions specified in it.

It does not appear, that a court was held at all by a judge, nor does it appear when or where the proceedings set forth were had, nor that a grand jury was drawn, sworn and charged.

There appears a copy of what purports to be the indictment, to which it is stated the defendant pleaded not guilty; that a jury was sworn and empaneled, that a verdict of guilty was rendered, and there was judgment thereon, and likewise the case for this court upon appeal agreed to by counsel, and the undertaking upon appeal. This is plainly insufficient.

This court is placed in connection with the court from which an appeal comes by means of the appeal taken, or some proper substitute for it. And as to the action, or pro-

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ceeding in which the appeal was taken, it can learn that a court was held by a judge at a time and place allowed by law, and of the parties to and the subject matter of the action, and the essential proceeding had in it, only from the record. And these things must appear to give this court complete jurisdiction.

Hence it must appear in the record, with reasonable certainty, that a court was held by a judge authorized by law to hold it, and at the place and time prescribed by law. In all cases, it must appear that the court had jurisdiction of the parties and of the subject matter; and so much not more, of the record in every case, ought to be sent up as will properly present the exceptions taken, that is, as will show that they were taken, the rulings of the court to which they apply, and how they bear upon the action. This court must be able to see that a court was held and that the action was properly constituted before it. This requirement is not mere matter of form that may be dispensed with. It is an essential part of procedure in every action. And however informal a record may be, these essential requisites must appear in it, else the court cannot proceed to examine the alleged errors, and decide the questions of law sought to be presented. *State v. King*, 5 Ired., 203; *Sudderth v. McCombs*, 67 N. C., 353; *State v. Jones*, 82 N. C., 691; *Howell v. Ray*, 83 N. C., 558; *State v. Gaylord*, 85 N. C., 551.

In this case it ought to appear in addition to what is set forth in the transcript, that at a term of the superior court held at the court house at a time prescribed by law, a judge, naming him, was present and presided, that a grand jury was drawn, sworn and charged, and that they, in open court, presented the indictment set forth in the transcript; and it would be better to set forth the entries made by the grand jury on the indictment. This fullness of the record is especially necessary in criminal actions, because the court in all such actions carefully examines and scrutinizes the whole record to see if there be any material error.

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It is the duty of the clerks of the courts to inform themselves as to the nature of their official duties and the methods of discharging the same; and they are not only remiss, but very censurable when they fail to do so. Great public evils spring from inefficient officers of court; they always retard and frequently defeat the due administration of justice. It is to be deplored that so many clerks of the courts are so inefficient, by reason of their lack of knowledge of their official duties. It would be well for counsel to see that transcripts are properly made up before they come to this court. We have heretofore recommended, and again recommend, to all clerks the excellent Book of Forms prepared by the late William Eaton. If they would properly follow that, wherein it is pertinent to their office, they could hardly fail to do their work intelligently and efficiently.

It sufficiently appears in the transcript before us, that a perfect transcript of the record has not been sent up, and the court will therefore, *ex mero motu* order that the writ of *certiorari* to issue, commanding the clerk of the superior court to certify to this court a full transcript of the record in this behalf. Let the writ issue. It is so ordered.

Certiorari ordered.

STATE v. LOUIS L. SPELLER.*Jurisdiction of Criminal offences.*

1. The inferior and superior courts have concurrent jurisdiction of all offences whereof jurisdiction is given to the inferior court. THE CODE, § 1241.

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2. These courts have jurisdiction of an indictment containing two counts—first, charging an assault with a deadly weapon, and secondly, an assault and battery; and a finding by the jury of “not guilty” on the first, but “guilty” on the second count, will not oust the jurisdiction—approving *State v. Ray*, 89 N. C., 587, and the case therein cited.

(*State v. Reaves*, 85 N. C., 553; *State v. Ray*, 89 N. C., 587, cited and approved.)

INDICTMENT for an assault, tried at Spring Term, 1884, of BERTIE Superior Court, before *Avery, J.*

The prosecution was commenced in the inferior court of Bertie county, and the indictment contained two counts—first, for an assault with a deadly weapon, and secondly, for an assault and battery. The jury found the defendant “not guilty” on the first count, but “guilty” on the second.

The assault and battery was proved to have been committed in November, 1883, and the bill of indictment was found by the grand jury at February term, 1884. It was also proved that it was committed by the defendant upon the person of the prosecutrix with a stick, which broke her arm.

The defendant moved in arrest of judgment upon the ground that it appeared from the bill of indictment that the court did not have jurisdiction of the offence, as charged in the second count of the indictment.

The motion was overruled, and the court rendered judgment, from which the defendant appealed to the superior court, and at spring term, 1884, of that court the judgment of the inferior court was affirmed and the defendant appealed to this court.

Attorney General, for the State.

No counsel for defendant.

ASHE, J. THE CODE, § 808, provides that the “inferior

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courts shall have jurisdiction of all crimes and misdemeanors, except those whereof exclusive original jurisdiction is given to justices of the peace, and except the crimes of murder, manslaughter, arson, rape, assault with intent to commit rape, burglary, horse stealing, libel, perjury, forgery and highway robbery." The crime of an assault and battery with a deadly weapon falls within neither of these exceptions. The inferior court consequently had jurisdiction of that offence.

The crime *charged*, then, in this indictment is one of which the inferior court had jurisdiction, but on the trial the jury found the defendant guilty of an assault and battery, but not guilty of assault and battery with a deadly weapon. The defendant was found guilty of an offence inferior to that as *charged*, and of which a justice of the peace had original jurisdiction. But the inferior offence is of the same nature as that charged, and it has been held by the court in *State v. Reaves*, 85 N. C., 553, and *State v. Ray*, 89 N. C., 587, in like cases, that where the superior courts have once gained jurisdiction, which they do by the general finding of "a true bill" by the grand jury, they will continue to hold it, and cannot be ousted of their jurisdiction by the finding of a verdict by the petty jury of "guilty" of the inferior offence only. And in this respect there can be no distinction between the jurisdiction of the superior and inferior courts; for by section 1241 of THE CODE it is provided that the inferior and superior courts shall have concurrent jurisdiction of all such offences whereof jurisdiction is given to inferior courts.

Our conclusion therefore is that the inferior court had jurisdiction and that there is no error. Let this opinion be certified to the superior court of Bertie county, that the same may be certified by that court to the inferior court of that county that the case may be proceeded with according to law.

No error.

Affirmed.

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STATE v. ALFRED WILLIFORD and others.

Jurisdiction, binding over of party to court does not give—Exception to Evidence—Declarations of Accused—Res gestæ.

1. Where courts have concurrent jurisdiction, that court possesses the case in which jurisdiction first attaches, as here, by the finding of the indictment. The fact that defendant was bound over to one of said courts and the return of the warrant made, does not necessarily give jurisdiction to such court.
2. An exception to evidence should state the testimony that this court may see and determine its effect.
3. What a defendant says is always received against him when pertinent to the issue, but not for him unless it be a part of the *res gestæ*; hence on trial of an indictment for forcible trespass, it was held no error to exclude the declarations of defendant while on his way to the prosecutor's house.

(*Childs v. Martin*, 69 N. C., 126; *State v. Tisdale*, 2 Dev. & Bat., 159; *State v. Casey*, Busb., 209; *Haywood v. Haywood*, 79 N. C., 42; *State v. Yarborough*, 1 Hawks, 78; *State v. Cowan*, 7 Ired., 239; *State v. Tilly*, 3 Ired., 424; *State v. Worthington*, 64 N. C., 594; *State v. Howard*, 82 N. C., 623; *State v. Bryson*, Winst., 86, cited and approved.)

INDICTMENT for forcible trespass tried at Spring Term, 1884, of HERTFORD Superior Court, before *Gudger, J.*

Verdict of guilty, judgment, appeal by the defendants.

Attorney General, for the State.

No counsel for defendants.

ASHE, J. The first point presented by the record was whether a plea in abatement to the jurisdiction of the court would lie.

The facts were these: The alleged forcible trespass was committed on the 25th of August, 1883, upon the house

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and premises of one Holloman ; that soon thereafter and before the fall term, 1883, of Hertford superior court, a warrant was issued against these defendants and one Lassiter by a magistrate of Hertford county, and on the hearing before said magistrate these defendants, (Lassiter not having been arrested,) were bound over to appear at February term, 1884, of the inferior court of Hertford county, to answer the charge of forcible trespass ; that at fall term, 1883, of the superior court for said county, this indictment was found and writs of *capias* were issued, upon which in March, 1884, and later, these defendants were arrested and gave bond for their appearance at spring term, 1884, of the superior court ; that the defendants appeared at the February term, 1884, of the inferior court of said county, when an indictment for the same offence was found by the grand jury of that court against the defendants, and the case was continued to August term, 1884, of said court, and the defendants entered into a recognizance to appear at said August term.

The defendants pleaded in abatement that the inferior court had jurisdiction of the case, but His Honor overruled the plea, and the defendants excepted.

The plea in abatement was properly overruled. The superior and inferior courts had concurrent jurisdiction of the offence of which the defendants were charged. THE CODE, § 1241, and the act of 1879, ch. 302. And when two or more courts have equal or concurrent jurisdiction of a case, that court possesses the case in which jurisdiction first attaches. *Childs v. Martin*, 69 N. C., 126 ; *State v. Tisdale*, 2 Dev. & Bat., 159 ; *State v. Casey*, Busb., 209 ; *Haywood v. Haywood*, 79 N. C., 42 ; *Merrill v. Lake*, 10 Ohio, 373 ; *State v. Yarborough*, 1 Hawks, 78.

Here, the offence was committed in August, 1883, and at fall term, 1883, of the superior court the bill of indictment

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upon which the defendants were tried and convicted was found.

The superior court thereby took jurisdiction of the case. No bill of indictment was found in the inferior court until its February term, 1884, after the superior court had taken possession of the case. The inferior court could not be said to have taken jurisdiction from the fact that the warrant issued in August, 1883, was returnable, and the defendants recognised to appear at the February term of said court; for the return of a warrant to a court does not necessarily give jurisdiction to such court, for the court may still fail to take cognizance of the case by proceeding with the prosecution. It was the duty of the magistrate under the act of 1879, to bind the defendants to the superior court, that being the first court after the arrest. But although the magistrate failed in his duty in this respect, the superior court having taken jurisdiction of the case, its jurisdiction could not be ousted by binding over the parties to a subsequent inferior court.

When the jurisdiction is concurrent, it would seem that either court may take jurisdiction, and when no objection by plea in abatement is made to the jurisdiction, it may proceed to judgment; and such judgment may be pleaded in bar of the prosecution in the other court. To that effect was the decision of the court in the case of *State v. Tisdale*, *supra*, where a bill of indictment for assault and battery was found in the superior court against a person who was subsequently, but before being taken to answer the charge in the superior court, indicted and convicted in the county court for the same offence; it was held that the county court had jurisdiction of the case notwithstanding the bill found in the superior court, and to that bill he might plead his former conviction in the county court.

The other exception taken by the defendants was founded on the refusal of His Honor to admit proof of the declara-

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tions of Lassiter when on his way to Holloman's house, as to the purpose of the defendants in going to said house. There was no error in this ruling. It is well settled that an exception of this character should set out the testimony proposed to be offered, that the court may see whether its rejection prejudiced the defendant. *State v. Cowan*, 7 Ired., 239. The exception is untenable on another ground. What a defendant says is always received against him when pertinent to the issue, but not for him, unless it be a part of the *res gestae*. *State v. Tilly*, 3 Ired., 424; *State v. Worthington*, 64 N. C., 594; *State v. Howard*, 82 N. C., 623; *State v. Bryson*, Winst., 86.

There is no error, let this be certified to the superior court of Hertford county that the case may be proceeded with according to law.

No error.

Affirmed.

STATE v. WILLIAM VAUGHAN.

Warrant of Justice, power to amend in Superior Court—Discretionary Power.

1. The court has the power to amend a justice's warrant in a criminal action, in form or substance, but the amendment must not change the nature of the offence intended to be charged. THE CODE, § 908.
2. Whether such power to amend shall be exercised, is discretionary with the presiding judge.

CRIMINAL ACTION, tried on appeal, at Fall Term, 1884, of GREENE Superior Court, before Avery, J.

The defendant appealed from the judgment rendered

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against him by the justice of the peace, to the superior court.

The warrant upon which the defendant was tried in the court of the justice of the peace, was as follows: *To any lawful officer, etc.:* Whereas, Taylor Barrow, overseer of the public road from Fort Run to Wayne county line, has complained on oath to me, one of the acting justices of the peace in and for said county, that he appointed the 8th day of August, 1884, to work said road, and that he gave William Vaughan, one of the hands liable to work on said road, lawful notice to attend and work said road, and that he failed and refused to do so: These are, therefore, to command you to arrest said William Vaughan, and him have before me at Shine, in said county, on the 27th day of August, 1884, at 10 o'clock A. M., then and there to answer said complaint, and be otherwise dealt with according to law." Given under my hand and seal this 27th day of August, 1884.

(Signed)

JOHN W. TAYLOR, J. P. [Seal.]

When the case was called in the superior court for trial, the defendant moved to quash the warrant, and the solicitor moved to amend the charging part of the warrant as follows, to wit: "That William Vaughan, late of Bull-head township, in the county of Greene aforesaid, on the 8th day of August, 1884, and for ten days and more, before the said William Vaughan had been duly summoned as a hand to work on said public road, situate in said township, in said Greene county, and was then and during all said time between eighteen and forty-five years of age, and liable to work on said public road, and that three days and more before the day first aforesaid, the said William Vaughan had been duly and lawfully summoned to work on said public road, on the said first named day, and that the said William Vaughan being then and there liable as aforesaid, and having been so summoned as aforesaid, did on the day

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and year aforesaid, in said township, in the county aforesaid, wilfully and unlawfully fail and omit to attend and work on said public road, as he was so summoned to do as aforesaid, he, the said William Vaughan, not having paid to said overseer one dollar to be relieved from so working on said public road, against the form of the statute in such case made and provided and against the peace and dignity of the state."

The court refused the motion to amend, on the ground that section 908 of THE CODE did not give the court power to grant the amendment asked, but allowed the motion to quash.

From the refusal of the court to allow the amendment, and the order of the court that the warrant be quashed, the solicitor appealed.

Attorney-General, for the State.

No counsel for the defendant.

ASHE, J. The only question presented for our consideration is, did the court have the power to allow the amendment? We think it unquestionably had such power.

THE CODE, § 908, under the provisions of which the solicitor made his motion to amend, is as follows:

"No process or other proceeding begun before a justice of the peace, whether in a civil or criminal action, shall be quashed or set aside, for the want of form, if the essential matters are set forth therein; and the court in which any such action shall be pending, *shall have power to amend any warrant, process, pleading, or proceeding in such action, either in form or substance*, for the furtherance of justice, on such terms as shall be deemed just, at any time either before or after judgment.

Before the adoption of THE CODE there was no statute investing the courts with the power of amending process, pro-

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ceedings, &c., had before justices of the peace. The only legislation on that subject was that "no process issued by a justice of the peace shall be set aside for the want of form if the essential matters are set forth therein." Rev. Code. ch. 62, § 22. This embraced civil as well as criminal process, but gave no power to amend in matters of substance. In civil actions, however, the amplest powers of amendment were given to the courts to amend any process, pleading or proceeding in such actions either in form or substance for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein. Rev. Code, ch. 3, § 1.

THE CODE in section 908 greatly extends the power of the courts. In fact, it gives them unrestricted power of amendment to all warrants, process, proceedings and pleadings in any action civil or criminal commenced before a justice of the peace in *form* or *substance* either before or after judgment.

We understand the purpose of the legislature in creating this statute was to confer power on the courts to make such amendment as may be deemed necessary to perfect the actions, pleadings, &c., begun before justices of the peace, where the essential matters are set forth, but not to change the character of the action or the nature of the offence intended to be charged.

And, while ample power of amendment is given in such cases, there is no restriction upon the discretion of the courts. His Honor in the court below might have refused, as a matter of discretion, to allow the amendment, but where his refusal was put upon the ground of his not having power to allow it, there was error.

Whether in this case there was any necessity for the amendment, or whether the court should have allowed the particular amendment proposed, we express no opinion; but we are clearly of opinion that under the provisions of

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the statute the court had the power to make the amendment in question.

There is error. Let this be certified to the superior court of Greene county, that the case may be proceeded with according to law.

Error.

Reversed.

 STATE v. JEFFERSON CROOK and another.

Appeal, statement of Case—Warrant, power to amend—Act of Assembly and Constitution discussed.

1. Where it appears that the appellant served no case upon the appellee and the judge makes the statement of the case on appeal, it is presumed that he did so by consent of parties.
2. But when the record presents the exceptions necessary to enable this court to pass upon them, no formal statement of a "case" need be made.
3. The court has power to amend a justice's warrant under THE CODE, § 908—see preceding case. The provisions of this statute are not in conflict with the constitution.
4. Article one, section thirteen of the constitution, providing that no person shall be convicted of crime but by the unanimous verdict of a jury, and giving the legislature power to provide other means of trial for petty misdemeanors with the right of appeal; and section twelve, to the effect, that no one shall be held to answer a criminal charge, "except as hereinafter allowed" but by indictment, &c., discussed and interpreted by MERRIMON, J.

(*State v. Gallimore*, 7 Ired., 147; *State v. Edney*, 80 N. C., 360; *State v. Fox*, 81 N. C., 576; *State v. Quick*, 72 N. C., 241; *State v. Bryson*, 84 N. C., 780; *State v. Powell*, 86 N. C., 640, cited and approved.)

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APPEAL from a justice's court tried at Spring Term, 1884, of UNION Superior Court, before *MacRae, J.*

The defendants were charged in a justice's warrant with a misdemeanor, in "unlawfully" releasing impounded stock, in violation of the act of 1879, ch. 135, § 12. The case is stated in the opinion here. The state solicitor appealed from the ruling of the court below.

Attorney-General, for the State.

Messrs. Covington & Adams, for defendants.

MERRIMON, J. A justice of the peace in the county of Union on the 16th day of May, 1883, issued his warrant against the defendants, charging them with a violation of the statute, (acts 1879, ch. 135, § 12,) and they were arrested and taken before the justice of the peace and tried. He found them guilty, gave judgment against them, and they appealed to the superior court.

The warrant charged that the mischief complained of was "unlawfully" done, but it did not charge that it was "unlawfully and wilfully" done.

In the superior court, the defendants moved to quash the warrant upon the ground that the offense was not sufficiently charged therein; that it ought to be alleged that the defendants did "unlawfully and wilfully," &c.

The solicitor for the state thereupon moved that the warrant be amended, so as to charge that the offense was "unlawfully and wilfully" done, &c.

The court denied the latter motion on the ground, "that the presiding judge had no power to make the amendment," allowed the motion to quash the warrant, and thereupon the state solicitor appealed to this court.

In this court the counsel for the defendants moved that the judgment of the superior court be affirmed, upon the ground that no case for this court upon appeal had been

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settled according to law, and he suggested, upon affidavit of the defendants, that the case settled upon appeal, which appears in the transcript of the record, was made by the presiding judge without notice to the defendants, or their counsel, and without their consent or sanction, and that the solicitor for the state had never served upon them, or either of them, nor upon their counsel, a case upon appeal as required by the statute in such cases.

Generally, the presumption is, nothing appearing to the contrary, that the case settled upon appeal to this court by the presiding judge, was settled by consent of parties, but if it be granted that this presumption is rebutted in this case by the affidavit of the defendants, the motion cannot be allowed, because the appeal brought the case into this court, and the record itself, without any case settled upon appeal, sufficiently presents the ground of exception to enable the court to decide the question presented by it.

The motion of defendants, the motion of the solicitor to amend, the denial of the one, the granting of the other, and the exception to the ruling of the court, all necessarily appear in the record, and therefore there was no necessity to settle the case upon appeal.

The object of settling the case upon appeal is to present the exceptions intelligently. Where these appear sufficiently in the record, a formal statement of the case is not necessary. And so, if the formal "settlement" of the case upon appeal in this case shall be treated as mere surplusage, as it may be, the court must look into the record and decide any question presented by it. *State v. Gallimore*, 7 Ired., 147; *State v. Edney*, 80 N. C., 360; *State v. Fox*, 81 N. C., 576.

The legislature has been careful to provide that process and proceedings, whether civil or criminal, begun before justices of the peace, shall not be quashed, set aside or fail, for want of form, if the essential matters are set forth therein. Statutory provision in this respect has been deemed neces-

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sary, because this useful class of officers is not generally composed of persons skilled in the law and its forms. The legislature meant to declare first, that their process and proceedings must be upheld when they can be, consistently with the rights of the parties litigant. And secondly, in furtherance of this view, the statute, THE CODE, § 908, provides that "the court in which any such action shall be pending, shall have power to amend any warrant, process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be deemed just, at any time, before or after judgment."

The power of amendment thus conferred upon the courts is very broad and thorough. Any amendment in either a civil or criminal action in respect to the warrant, process, pleading or proceeding, in form or substance, may, in the discretion of the court, be made in furtherance of justice. This does not, however, imply, certainly in a criminal action, power to change the nature of the action, or rather, the nature of the offense intended to be charged, so as to charge an entirely different offense in substance from that at first intended, but any amendment may be made that perfects the charge of the offense whether such amendment affects the form or the substance. It has been so held at the present term in *State v. Vaughan*, ante 532.

The counsel for the defendants, on the argument, questioned the power of the legislature to invest the courts with such power of amendment in respect to criminal actions, upon the ground that it left the power to amend, change or modify the accusation, in the appellate court, and this would, he insisted, be in violation of the Bill of Rights, and he cited section 13 of article one, which provides that, "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal."

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It will be observed that the last clause of this section provides that, "the legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal." This plainly implies that, *as to petty misdemeanors*, a method of trial other than by jury in the ordinary method may be provided by the legislature, if the right of appeal be allowed—that is, the right to appeal to a court where trial by jury may be had.

It is said, however, that this interpretation is in conflict with section twelve of article one of the constitution, which provides that, "No person shall be put to answer any criminal charge, *except as hereinafter allowed*, but by indictment, presentment or impeachment."

It is obvious, that the words of the section, "except as hereinafter allowed," have reference to the last clause of the section next succeeding it, and are intended to harmonize the two sections and let both operate.

The very purpose of conferring on the legislature power to provide means of trial other than by jury in the ordinary way, as to petty misdemeanors, is to avoid the inconvenience, expense and delay attendant upon indictments by the grand jury, and the trial by jury where the parties choose to waive it, in the ordinary course of criminal procedure. Prior to the present constitution, the legislature did not possess such power, and there was much complaint at the costliness, inconvenience and delay in the administration of criminal justice in respect to small offenses. One object had in view by the new constitution is, to obviate that evil. In addition to the provisions above cited and in furtherance of the same purpose, it is provided, among other things, in section 27 of article four, that, "the several justices of the peace shall have jurisdiction *under such regulations as the general assembly shall prescribe*, * * * of all criminal matters arising within their counties, where the punishment cannot exceed a fine of fifty dollars, or impris-

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onment for thirty days. * * * * When an issue of fact shall be joined before a justice of the peace, on demand of either party thereto, he shall cause a jury of six men to be summoned, who shall try the same. * * * * In all cases of a criminal nature, the party against whom judgment is given, may appeal to the superior court where the matter shall be heard anew."

The provisions of the constitution referred to bearing upon the subject before us, all have the same common purpose, and must be construed together. That purpose is manifest, and the necessary incidental powers to completely effectuate it cannot be denied. It is contemplated that the justice of the peace shall grant his warrant in all proper cases, and that warrant shall contain the accusation against the party charged with the petty offense; if he accuses imperfectly, he may amend his warrant so as to perfect the charge of the same offense; he may try the party, or either party to the prosecution may demand and have a jury trial, the jury to consist of six men; the defendant, if convicted, may appeal to the superior court, and in that court "the matter shall be heard anew." What matter? Plainly, the matter tried before the justice of the peace. It is not contemplated as suggested by counsel, that a bill shall be sent before the grand jury in superior court, and the accused tried, not "anew," but upon indictment found. The warrant issued by the justice of the peace, and containing the accusation, is the matter to be tried "anew." If upon the appeal, the court shall find the warrant or accusation made in it, imperfect by reason of lack of form or substance, the court may, in its discretion, amend and perfect one or both, not changing the nature of the offense. THE CODE, § 908, expressly allows this to be done, and the statute is not inconsistent with the constitution; indeed, it executes effectually its purpose and intent. The legislature is fully empowered to provide "other means of trial for petty misdemeanors," than the ordinary

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method, and justices of the peace have jurisdiction of the offences, "under such regulations as the general assembly shall prescribe." How the accusation shall be made, how informal and imperfect accusations shall be amended and perfected, is not prescribed by the constitution; this is left to the legislature, and the power in that respect is not restricted, certainly by any express limitation.

The power conferred upon the superior court to amend proceedings before a justice of the peace upon appeal, is neither unreasonable nor oppressive. How is the accused injured or prejudiced by perfecting the charge against him in the superior court? He goes into that court after he has been tried before the justice of the peace. Is he to escape there because of lack of form in the warrant or charge against him, and go back and take his chances of escape a second time upon another warrant, accusation and trial before the justice of the peace, not skilled in the law, and dissatisfied with his judgment, go to the superior court to escape there a second time, because of informality? Surely the constitution does not contemplate so idle, so vicious a method of procedure! If allowed, it would practically, in a large degree, defeat the purpose of the constitution in conferring upon the legislature power to provide specially for the trial of petty misdemeanors. The exercise of such power of amendment in the superior court is essential to render the jurisdiction of justices of the peace practically effectual in criminal matters wherein appeals shall be taken. *State v. Quick*, 72 N. C., 241; *State v. Bryson*, 84 N. C., 780; *State v. Powell*, 86 N. C., 640.

The court erred in holding that it had no power to allow the amendment prayed for by the solicitor for the state, and for such error, the judgment must be reversed. To that end let this opinion be certified according to law.

Error.

Reversed.

STATE v. BRODNAX.

STATE v. DOUGLASS BRODNAX.

Concealed Weapon—Criminal Intent.

1. One is not guilty of a violation of the statute prohibiting the carrying of concealed weapons, where it appears that he had a pistol in his pocket for the purpose of delivering it to the owner who had sent him for it. The facts here show that there was no criminal intent.
2. The mischief provided against, is the practice of wearing weapons concealed about the person to be used upon an emergency.

(*State v. Gilbert*, 87 N. C., 527, cited and approved).

INDICTMENT for carrying concealed weapon, tried at Fall Term, 1881, of ROCKINGHAM Superior Court, before *Gudger, J.*

The defendant was charged with carrying a pistol, concealed about his person, off his own premises, in violation of the act of 1879, ch. 127. THE CODE, § 1005.

He was found off his own premises on the platform at the depot, at Reidsville, with a pistol in his pocket.

At the time of finding the pistol in defendant's pocket by a policeman, he stated that the pistol belonged to one George McCain, with whom he boarded, and that McCain had sent him to bring the pistol from the residence of one Charles Gunn, and that while on his way with the pistol he had purchased for one Hardin Scales, who was going off on the train, a pint of whisky, and that he was on the platform to deliver the whisky when arrested.

The defendant testified to these facts, and was corroborated by both McCain and Gunn, as to the facts that he had been sent for the pistol, and that it had been delivered to him for the purpose of being carried to McCain, who was the owner.

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The defendant was also corroborated by Hardin Scales as to the fact that he had requested him to bring him a pint of whiskey on the evening of his arrest, as testified to by defendant.

The defendant was found guilty, and there was judgment against him, from which he appealed.

Attorney-General for the State.

No cause for the defendant.

ASHE, J. The case of *State v. Gilbert*, 87 N. C., 527, is decisive of this case. There, a merchant while in the streets of Asheville, had in his overcoat pocket, concealed from view, a pistol which he had bought as a sample, and was carrying it to another store in the town to have it packed with other goods which he had bought to be carried to his store in the country. It was held by this court that he was not guilty of a violation of the statute. Mr. Justice RUFFIN, who delivered the opinion of the court, said: "To hold that a merchant, who, having just purchased a pistol with a view to his trade, and carrying it from one store in a town to another for the purpose of having it packed with other goods, thoughtlessly put it in his pocket, not caring, and not thinking whether it could be seen or not, is guilty of a criminal violation of the laws of his country, is more, we think, than was ever contemplated by those who framed the law upon the subject, and very certainly seems far removed from the mischief that it was intended to remedy."

To be sure in that case there was a special verdict and the jury found there was no criminal intent. But the facts developed in this case show as conclusively that there was no criminal intent, as if that fact had been found by a jury. The facts of this case are so similar in character, to those in the case cited, that if the defendant was not guilty in that case, he cannot be in this.

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The mischief intended to be remedied by the statute was the practice of *wearing* offensive weapons concealed about the person, or carrying them so concealed with a purpose to be used offensively or defensively upon an emergency. We cannot believe that it was the intention of the law-makers to hold one answerable to the criminal law who carries a pistol, for instance, in his pocket to a gunsmith to be repaired, or that a gentleman residing in a city who buys a pistol to be taken to his residence, is required to carry it through the streets openly in his hand. It would certainly be an unseemly plight for some members of the community, who might yet think that a pistol was a necessary household article for protection against thieves and burglars. There is error. Let this be certified, &c.

Error.

Reversed.

 STATE v. FILLMORE ERWIN.
Concealed Weapon—Butcher's Knife.

1. The act of assembly making it indictable for one to carry concealed about his person any "pistol, bowie knife, razor or other deadly weapon of like kind," embraces a butcher's knife.
2. The words "other deadly weapons of like kind" imply similarity in the deadly character of weapons, such as can be conveniently concealed about one's person to be used as a weapon of offence and defence.

(*State v. Gilbert*, 87 N. C., 527; *State v. Woodfin*, *Ib.* 526; *State v. McManus*, 89 N. C., 555; *State v. Allison*, 90 N. C., 733, and cases there cited.)

INDICTMENT for carrying concealed weapon, tried at Fall Term, 1884, of BUNCOMBE Superior Court, before *Shipp, J.*

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This prosecution was commenced in the inferior court, and from the judgment pronounced upon a verdict of guilty, the defendant appealed to the superior court where the judgment below was affirmed, and the defendant then appealed to this court.

Attorney-General, for the State.

Messrs. Jones & Hardwicke, for defendant.

MERRIMON, J. The defendant was indicted for a violation of the statute, THE CODE, § 1005. It is charged in the indictment, that he "did unlawfully and wilfully carry concealed from sight about his person a deadly weapon, to-wit, a certain *butcher's knife*, contrary," &c.

It was in evidence on the trial that the defendant "carried concealed about his person a butcher's knife eleven inches long, with a sharp pointed and sharp edged blade six inches long and one-fourth, (this, as was said in the argument, ought to be one and one-fourth) inch wide."

The court instructed the jury, "that a butcher's knife of the kind described by the witness was a deadly weapon within the meaning," of the statute cited above, "and that if they were satisfied beyond a reasonable doubt that defendant while off his own premises, and not being an officer, &c., carried concealed about his person with a criminal intent such a knife as the one described by the witness, he would be guilty." To this instruction the defendant excepted.

The words of the statute to be considered here are, "shall carry concealed about his person any pistol, bowie knife, dirk, dagger, slung-shot, loaded cane, brass, iron or metallic knuckles, or razor, or *other deadly weapon of like kind*," &c.

On the argument the counsel for the defendant, while admitting that a "butcher's knife" is a deadly instrument, insisted that it is not mentioned in the statute, nor is it of

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"the like kind" with those mentioned, and, therefore the statute does not embrace such deadly weapon, and it is not indictable to carry it as the owner may see fit to do.

This is not, in our judgment, a proper interpretation of the meaning of the statute. It is plainly its general purpose to prohibit and prevent the carrying of deadly weapons concealed about the person for purposes offensive and defensive, and thus protect individuals against sudden, unexpected, dangerous and perhaps deadly violence inflicted with weapons, that the assailing party has concealed in some way, on, about, or conveniently near to his person, and which he may use under sudden impulse, or deliberately and unfairly against one taken unawares; and further to conserve the public peace and safety.

Its particular provisions all tend to support the same purpose. It enumerates and designates by name several kinds of deadly weapons, most of which are used only for purposes of assault or defence; but with a view to make it comprehensive, and take in all deadly weapons that may be safely concealed and used for such purpose, it adds the words, "or other deadly weapons of like kind." This clause is very broad; it implies any deadly weapon of like kind. Of like kind in what respect? The counsel for the defendant says, of like kind, in that, the weapon is used only for purposes offensive and defensive. That interpretation is too narrow; it would defeat in large measure the general purposes of the statute, and would not remedy the evil intended to be suppressed. A man could use a great variety of instruments employed ordinarily for useful, practical purpose, as deadly weapons of a very fatal type; as for example, a butcher's knife, a shoe knife, a carving knife, a hammer, a hatchet, and the like; and these could be carried concealed about or near the person as readily and as easily as the things mentioned by name in the statute.

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It seems to us that a more reasonable interpretation of the words "or other deadly weapon of like kind," and one that subserves the ends sought to be attained, is that they imply, like kind in their deadly character, and in that, they are such as can be easily concealed on, about, or conveniently near to the person, and used promptly, like the weapons designated by name may be. The word *kind* does not mean necessarily of the same, and only of the same and like purpose; it may just as properly and readily be taken as meaning kind in deadliness, kind in the facility with which it may be concealed and used; and as this meaning serves the plain purpose of the statute, and any other does not, it must be accepted and adopted as the true one.

It is said, however, that this interpretation is too sweeping in its scope; it would embrace small and large pocket knives, and like useful practical things that men constantly carry in their pockets and about their persons, and are more or less deadly instruments in their character. The answer to this is, that these things are not ordinarily carried and used as deadly weapons, but for practical purposes, and the ordinary pocket knife cannot be reckoned as *per se* a deadly weapon; but it would be indictable to so carry them for such unlawful purpose if deadly in their type and nature. If one should carry a pocket knife, deadly in its character, as a weapon of assault and defense, he would be indictable, just as he would be if he carried a dirk or dagger.

The unlawful and wilful purpose is an essential quality of the offense denounced. And hence this court has held, that it was not indictable for a merchant to carry a pistol in his pocket, not caring whether it was seen or not, from one store to another to be packed with other goods. The purpose as appeared by the circumstances was so manifestly innocent, as to rebut the statutory presumption of guilt. *State v. Gilbert*, 87 N. C., 527. In that case the court said: "*To conceal a weapon* means something more than the mere act

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of having it where it may not be seen. It implies an assent of the mind, and a *purpose* to so carry it that it may not be seen." And it may be added, that the unlawful and wilful intent and purpose with which the instrument is so carried is likewise an element of the offence. *State v. McManus*, 89 N. C., 555; *State v. Brodnax*, *ante*, 543.

If any one, with the exceptions specified in the statute, is found off his own lands with such deadly weapon about his person, that is, one of the deadly weapons designated or a like one, as pointed out above, such possession would be *prima facie* evidence of the concealment thereof, and there would arise a presumption of fact, that he has such deadly weapon and so carries it wilfully and for an unlawful purpose, but this presumption may be rebutted by the party accused. Such presumption may be slight in some cases; it would be very strong, almost conclusive in others; depending always on the character of the weapon and the circumstances under which it shall be carried. One person might carry a pistol concealed from view in his pocket, as was done in the case of *State v. Gilbert*, *supra*, and the circumstances would rebut the presumption of guilt; another might carry a dirk or dagger concealed about his person off his own land to a church or political assembly, in which case the presumption of a purpose to violate the statute would be very great, almost conclusive. The case of the *State v. Woodfin*, 87 N. C., 526, seems to have been one of the latter kind. The facts in evidence on the trial in that case were not sent up as they ought to have been. The court could only see from the record, that the defendant went hunting *with a pistol* in his pocket, or concealed on his person, and it said, these being the facts appearing from inference, "he was clearly guilty of a violation of the statute."

A person who carries a deadly weapon off his own land, concealed about his person, is not necessarily and at all events guilty of a violation of the statute; he must do so

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wilfully and of purpose; the presumption is against him, but he may rebut this by proper evidence.

The statute under consideration does not provide in terms that the acts forbidden by it must be done *unlawfully and wilfully*, but this is implied in this, as in like statutes. *State v. Simpson*, 73 N. C., 269; *State v. Parker*, 81 N. C., 548; *State v. Allison*, 90 N. C., 733.

There is no error, and the judgment must be affirmed. Let this opinion be certified to the superior court, to the end that that court may proceed according to law. It is so ordered.

No error.

Affirmed.

 STATE v. REBECCA PARTLOW.

Act of Assembly, void for ambiguity, and cannot be helped by evidence aliunde—Liquor selling—Witness.

1. If a statute be so vague in its terms as to convey no definite meaning to the court or a ministerial officer, it is void.
2. An act of assembly prohibited the sale of liquor "within three miles of Mt. Zion church in Gaston county," and it appeared on trial of an indictment for its violation that there were two churches of that name in the county; *Held*, the act is ambiguous and inoperative.
3. Neither a member of the legislature at the time of the passage of such act, nor other person is competent to testify as to which church it has reference. It is the act of the legislature as an organized body, and its meaning must be ascertained according to the established rules of construction.

(*State v. Boon*, Tay., 103; *Drake v. Drake*, 4 Dev., 110; *Adams v. Turrentine*, 8 Ired., 147; *State v. Melton*, Busb., 49; *Blue v. McDuffie*, Ib., 131, cited and approved).

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INDICTMENT for selling liquor tried at Spring Term, 1884, of GASTON Superior Court, before *MacRae, J.*

The defendant is indicted for selling one quart of spirituous liquor to one Rutherford within three miles of Mount Zion church, in the county of Gaston, in violation of the act of 1881, ch. 234.

It was in evidence that the liquor was sold as alleged; and that there were two churches, (about fifteen miles apart) each called "Mount Zion church," in said county—one for the white people, and the other for the colored people. And there was nothing in the statute indicating to which of these two churches the name applied or had reference.

With a view to apply the statute, the state introduced a witness who was a senator in the general assembly at the time the act in question was passed, and the court allowed him to testify, after objection, that it was intended to apply to the church mentioned by himself and the other witnesses, and this he knew, because the provision of the act in respect to Mount Zion church was inserted upon his motion, made in response to petitions praying for the prohibition of the sale of spirituous liquor within three miles of Mount Zion colored church, signed by colored people whom he knew. The defendant excepted, and further insisted that the statute was ambiguous and therefore void.

Verdict of guilty; judgment; appeal by the defendant.

Attorney-General, for the State.

Messrs. Hoke & Hoke, for defendant.

MERRIMON, J. The act of 1881, ch. 234, prohibits the sale of spirituous liquors within designated distances from many churches and other places named therein. So much of it as is material to this case provides, "that the sale of spirituous liquors shall be prohibited within three miles of * * * Mount Zion church in Gaston county."

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It appeared on the trial that there were two churches bearing the name "Mt. Zion" in Gaston county, and there is nothing in the statute indicating to which of them it applies.

It is plainly the duty of the court to so construe a statute, ambiguous in its meaning, as to give effect to the legislative intent, if this be practicable. Its meaning in respect to what it has reference and the objects it embraces, as well as in other respects, is to be ascertained by appropriate means and *indicia*, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes *in pari materia*, the preamble, the title, and other like means. But the meaning must be ascertained from the statute itself, and the means and signs to which, as appears upon its face, it has reference. It cannot be proved by a member of the legislature or other person, whether interested in its enactment or not. A statute is an act of the legislature as an organized body. It expresses the collective will of that body, and no single member of it, or all the members as individuals, can be heard to say what the meaning of the statute is. It must speak for and be construed by itself, by the means and signs indicated above. Otherwise, each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent. / *State v. Boon*, Taylor's Rep., 103; *Drake v. Drake*, 4 Dev., 110; *Adams v. Turrentine*, 8 Ired., 147; *State v. Melton*, Busb., 49; *Blue v. McDuffie*, *Ib.*, 131; Potter's *Dwarris on Statutes*, 179, *et seq.*

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But a statute must be capable of construction and interpretation ; otherwise it will be inoperative and void. The court must use every authorized means to ascertain and give it an intelligible meaning ; but if after such effort it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial certainty can be settled upon as to the meaning, the court is not at liberty to supply, to make one. The court may not allow "conjectural interpretation to usurp the place of judicial exposition." There must be a competent and efficient expression of the legislative will. In *Drake v. Drake*, *supra*, Chief Justice RUFFIN said : "Whether a statute be a public or private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."

When the statute intends to refer to and embrace within its provisions one or more of a multitude of things of the same kind, or one or more persons of many of the same name, it must do so in some way or manner, in terms, or by reasonable implication, or appropriate descriptive words, to designate what things or persons are intended by it. Else, how can the court or a ministerial officer decide what things or persons are meant ? A member of the legislature might say one thing or person was meant ; another might say another thing or person was meant ; a third might say yet another thing or person was meant ; and thus the legislative will might entirely fail. The statute must speak. The legislative expression of its purpose and will must prevail ; and if this does not appear with such a degree of certainty as that the court can learn what it is, the statute cannot operate.

Now the clause of the statute before us simply refers to "Mount Zion church in Gaston county," and there are two

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churches of that name in that county. There is nothing in the statute that in the remotest degree indicates to which of the two it refers. There are no means or signs of any kind appearing in it, in terms, by implication, by reference, or by any possible construction, that go to point to one of the two churches any more than to the other. It must, therefore, be as inoperative as if there was no church, or fifty churches of the same name in that county.

The testimony of the witness, who was a senator at the time the statute was enacted, was wholly incompetent for the reasons already stated.

We are constrained to declare that the clause of the statute under consideration is, because of its ambiguity, inoperative and void.

There is error, for which the judgment of the superior court must be reversed, and further proceedings had according to law. Let this be certified.

Error.

Reversed.

 STATE v. MOSES L. BEAN.

Town and Cities—Taxation.

1. A town has no right to impose any tax but such as is expressly authorized by its charter for purposes of revenue.
2. The power to pass ordinances for regulating the internal affairs of a town (market regulations and the like), is a police power and does not of itself confer the right to levy taxes.
3. The power to license persons for the privilege of carrying on trades and to require a price therefor, is a police power, but does not give the right to use the license as a mode of taxation for revenue, in

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the absence of a clear intent in the charter. The license fee must be reasonable and not for the purpose of raising revenue. The power to "license" and to "tax," discussed and distinguished by ASHE, J.

(*Com'rs v. Means*, 7 Ired., 406; *Pullen v. Com'rs*, 68 N. C., 451, cited and approved.)

CRIMINAL ACTION, commenced before the mayor of Salisbury, for violation of town ordinance, and tried on appeal at Spring Term, 1884, of ROWAN Superior Court, before *Gilmer, J.*

By the act of incorporation of the town of Salisbury ratified on the 27th day of January, 1859, it was enacted in section 28 that the commissioners of said town shall have power to regulate the manner in which provisions may be sold in the streets and markets, and to fix penalties for the breach of their ordinances which shall be recovered in the name of the commissioners of the town of Salisbury before any court having competent jurisdiction; and afterwards, to-wit., on the 26th of August, 1881, the commissioners passed the ordinance for the violation of which this prosecution was commenced, a copy of which is hereinafter set forth in the special verdict of the jury, who at said term of the superior court found as follows:

"That the charter of the town of Salisbury authorizes the commissioners of the town of Salisbury to regulate the manner in which provisions may be sold in the streets and markets, and to fix penalties for the breach of this ordinance and that thereupon the commissioners for the town of Salisbury passed an ordinance as follows:

Be it ordained that no butcher or other person shall cut up and expose to sale any fresh meat within the corporate limits of the town of Salisbury, without first obtaining a license from the commissioners of the town, which license shall authorize the person or persons to sell meat, at a certain stand, shop or stall, specified in said license, to be used

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as a market, and for which license said persons shall pay the sum of three dollars per month, payable in advance, and any person selling meat without a license, or at any place not licensed as a market, shall forfeit and pay for each offence the sum of ten dollars.

We further find that thereafter the said town passed the following ordinance:

Be it ordained that no beef or other fresh meat shall be hung up or publicly exposed on the side-walks, under a penalty of a fine of five dollars for each and every offence.

We further find as a fact that the defendant did thereafter carry on the business of a butcher and expose to sale fresh meat within the corporate limits of said town, and without paying the tax of three dollars per month, payable in advance, and that said meats so sold and exposed for sale were not the products of defendant's farm, and that the town collector of Salisbury demanded said taxes, and defendant refused to pay the same.

Upon the facts so found as aforesaid, we further say, that if in law the commissioners of the town of Salisbury had legal authority to pass the first ordinance aforesaid, then we find the defendant guilty; but if the said commissioners had not legal authority to pass such ordinance, then we find the defendant not guilty."

Upon the finding of the jury the court adjudged that the defendant was not guilty, and the solicitor appealed.

Attorney-General and J. M. McCorkle, for the State.

Mr. Theo. F. Klutz, for defendant.

ASHE, J. The question is, did His Honor err in pronouncing judgment upon the special verdict. And this involves the inquiry whether the commissioners of the town of Salisbury had the power under its charter and its amendments, to require that butchers, before selling fresh

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meat in the town of Salisbury, should first obtain a license therefor and pay the sum of three dollars per month in advance for the privilege.

By the original act of incorporation, ratified the 27th day of January, 1859, the commissioners of the town were empowered to levy taxes upon the polls and real property, upon stoops, steps, porches or piazzas encroaching more than a certain distance upon the streets; upon hogs and dogs, peddlers, circusses, rope dancers, &c., and it was enacted (the 28th section of the act): "That said board of commissioners shall have power to regulate the manner in which provisions may be sold in the streets and markets of said town, and to regulate the manner in which the public markets and streets in said town may be used, and to affix penalties for the breach of these ordinances which shall be recovered in the name of the commissioners of the town of Salisbury before any court having competent jurisdiction.

But no power was given to the commissioners to impose a tax or fee upon any persons for the privilege of exercising a trade or calling within the town.

The act of 1859, ch. 223, an act to amend the charter of the town of Salisbury, enacted: "That the board of commissioners for the town of Salisbury shall have power annually to levy and cause to be collected in the manner prescribed in the charter the following *additional taxes*, and here was enumerated a long list of taxable subjects, but the power to tax butchers or to require them to take out and pay for a license before exercising their business, is nowhere given in this amendatory act."

The act was followed by the act of 1877, ch. 138, which was "an act to extend the corporate limits of the town of Salisbury, and to amend the charter of said town." It is provided in section 15 of this act: "That in addition to the *ad valorem* tax on property the board of commissioners shall have power to levy and collect the following *taxes for*

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the privilege of carrying on the business or doing the act named, to wit:" Here follows a catalogue of some twenty objects of taxation, but butchers or the venders of meat are not mentioned.

The power here given the commissioners of Salisbury to levy a tax upon the subjects enumerated is clearly a power to tax for the *purpose of revenue*, and the fact that butchers are not included in the enumeration shows that the legislature did not intend to give the commissioners the power to tax them. The maxim "*expressio unius exclusio alterius*," applies. Besides it is well settled that commissioners of a town have no right to impose any taxes but such as are expressly authorized by the act of incorporation. *Commissioners v. Means*, 7 Ired., 406; *Pullen v. Commissioners*, 68 N. C., 451.

The right to levy taxes for the privilege of carrying on any trade, calling or business as given by the act of 1877, is manifestly a power to tax for the purpose of revenue. It is called a tax in the act, and it is not competent for the commissioners, by calling it a license, to do indirectly what they are prohibited from doing directly.

The commissioners, however, seem to have founded their right to adopt the ordinance in question under the power of police regulation given by the 28th section of the original charter above cited, which vests in them the power to regulate the manner in which provisions may be sold in the streets and markets of the said town, and to regulate the manner in which the public markets and streets in said town may be used, and to affix penalties for the breach of the ordinance, &c.

The power here given is a mere police power, and there is a marked distinction between the power of taxation and the usual police powers which were all that were intended to be given by the section just recited. These powers are granted for the purpose of enabling city and town author-

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ities to preserve the peace and good order of the community, to provide for the sanitary condition, to establish markets and regulate them, to have supervision over the streets, and pass all ordinances for the administration of their internal affairs which are consistent with their charters and not in contravention of the general laws of the state. And these ordinances may be enforced by penalties or fines, and by criminal actions in cases where the courts have jurisdiction. But the power to tax for the purpose of revenue is not one of the functions of police power. There are authorities to be found to the effect that, under the police power, license may be granted for the exercise of particular avocations and employments; but in all such cases, it is held that the fee or price exacted for the privilege must not be with the view to revenue, and in such cases it is competent and proper for the courts, where the effect and purpose of an ordinance are brought to be reviewed by them, to see that the fee or price paid for the privilege of exercising the franchise is reasonable, and not for the purpose of raising revenue. *Desty on Taxation*, 306, and to the like effect is *Staté v. The Mayor, &c.*, 33 N. J., 280. And in *Dillon on Municipal Corporations*, § 357, (3rd edition) is to be found the following passage on this point: "Concerning useful trades and employments, a distinction is to be observed between the power to 'license' and the power to 'tax.' In such cases, the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit or use the license as a mode of taxation with the view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged."

In *Commonwealth v. Stodd*, 2 Cush, 562, it was held, that where authority was given to a city to adopt rules and orders for the regulation of omnibuses, stages, &c., it did not authorize the adoption of an ordinance requiring the payment of a tax or duty on each carriage-license, varying

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from one to twenty dollars according to the different kinds of carriages. It was regarded as a direct tax upon the vehicle used, or its owner, and not necessary to secure the objects of the above grant of power to the city.

And in *Delcamber v. Clare*, 34 La. An., 1050, it was held that a charge of a specific amount for the daily privilege of keeping a private butcher's stand is a license or tax. The power of municipal corporations must be expressly conferred by law. Such corporation may, under its police power, regulate or suppress such private markets, but cannot under such power impose a tax for revenue.

In *Vansant v. Harlem Stage Co.*, 59 Md. 330, it is decided that the power given to the city of Baltimore by the act of 1880, ch. 69, "to license and regulate all carriages and other vehicles, does not confer a power to tax such vehicles for revenue purposes, and an ordinance requiring the payment of seventy-five dollars as an original license for an omnibus, and fifty dollars for an annual renewal thereof, is void as amounting to the exercise of the taxing power."

And in the case of *Commissioners v. Means*, *supra*, it is held, "a power to enact by-laws, &c., for the good government of the town, *of itself*, confers no right to levy taxes.

The consideration of the case then resolves itself in the inquiries, whether the three dollars per month, payable in advance, exacted for the privilege of the selling of butcher's meat in the town of Salisbury, was the exercise of police power conferred upon the corporation for the good government of the town, or was a tax levied with the view to revenue, and we are of the opinion the latter was the main object of the commissioners in adopting the ordinance, and it is therefore void.

The court below committed no error in the judgment pronounced upon the special verdict. Let this be certified to the superior court of Rowan county, that the defendant may have his discharge.

No error.

Affirmed.

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STATE v. JOSEPH C. HILL.

Indictment—Felony and Misdemeanor—Embezzlement—Statutory Crimes.

1. An indictment framed under section 3678 of THE CODE, charging the defendant with embezzlement in "wilfully, knowingly and corruptly" failing to pay over a fine to the school fund, is sufficient. Such offence is a misdemeanor, and therefore it was error in the court to arrest judgment upon the ground that the word "feloniously" was omitted.
2. A statutory crime is not a felony unless so declared by the legislature.
3. Nor will an offence be made a felony by the construction of any doubtful and ambiguous words in the statute creating it.
4. The doctrine that a crime is a felony where the punishment prescribed is confinement in the penitentiary, does not obtain in this state.

INDICTMENT for embezzlement tried at August Term, 1884, of NEW HANOVER Criminal Court, before *Meares, J.*

The defendant being a justice of the peace, was indicted under THE CODE, § 3678, for embezzlement in failing to pay over a fine of five dollars, which he had, as said justice, imposed as a judgment upon and received from one Bryan, to the treasurer of the county board of education for the county of New Hanover within the time prescribed by law. The bill charged the offence as having been committed "wilfully, knowingly and corruptly," &c.

The defendant was found guilty, and then moved in arrest of judgment upon the ground that the bill of indictment failed to charge that the offence was a *felonious* embezzlement. The court sustained the motion, and the solicitor appealed to this court.

Attorney-General, for the State.

Messrs. Russell & Ricaud, for the defendant.

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ASHE, J. Embezzlement has no legal status in the Criminal Code, either as a felony or a misdemeanor. As a crime it had no existence at the common law. It was then only a breach of trust, being the "fraudulent appropriation, to one's own use, of the money or goods of another entrusted to one's care or management."

As a crime, it is entirely the creation of the statute law, and is a felony or misdemeanor only as it may be declared to be by the statute creating the offence.

In this state, we have no statute defining embezzlement and fixing the grade of the offence. In some of the statutes it is declared to be a felony; and in another, a misdemeanor. For instance, embezzlement by any officer, agent, clerk, employee or servant of any corporation, THE CODE, § 1014; by public officers or employees of the state, § 1015; by public officers of trust funds, § 1016; by officers of railroad companies, § 1018; and by persons conspiring with the officers of railroad companies, § 1019; in each of these cases the offence of embezzlement is expressly declared to be a felony. But embezzlement by the treasurer of a benevolent or religious institution is made a misdemeanor, § 1017.

But section 3705, which provides that any officer who shall appropriate certain taxes shall be guilty of embezzlement, and prescribes the punishment, is silent as to whether the offence shall be a felony or misdemeanor.

So section 3678 (act of 1883, ch. 136 §§ 48 and 49) under which the indictment in this case was preferred, which declares that the offender shall be guilty of embezzlement and may be punished not exceeding five years in the penitentiary and fined at the discretion of the court, also fails to define the grade of the offence. The term embezzlement might have been omitted in the section and the offence intended to be created would have been as well defined.

Since the legislature has not by any general statute fixed the grade of embezzlement, and has sometimes made it a

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felony and then a misdemeanor, for this court to hold that the term embezzlement as used in this section implies *ex vi termini* a felony, would be infringing upon the province of the legislature. No crime created by statute can be made a felony unless it is so expressly declared by the legislature, unless it is so defined by the terms of its creation as to constitute it a felony; as where a statute declares, that the offender shall, under the particular circumstances, be deemed to have feloniously committed the act, it makes the offence a felony and imposes all the common and ordinary consequences attending a felony. 1 Russell on Crimes, p. 78. But this author adds in the same paragraph: "An offence shall never be made a felony by the construction of any doubtful and ambiguous words in a statute."

We are aware that in some of our sister states, every crime is held to be a felony where the punishment prescribed is confinement in the penitentiary. But that doctrine does not obtain in this state, for there are many of our statutes which impose that punishment where the offence created is expressly declared to be a misdemeanor; for example, see THE CODE, § 976 and 985, sub. div. 45 and 7.

Our conclusion is that the offence created by the act under which the bill of indictment in this case was drawn is a misdemeanor, and therefore there was error in arresting the judgment.

Let this be certified to the criminal court of New Hanover county, that the case may be proceeded with according to law.

Error.

Reversed.

STATE v. ELIASON.

STATE v. W. A. ELIASON and another.

Judge's Charge, exception to—New trial, discretion of Judge—Fornication and Adultery.

1. While exceptions to a judge's charge may be taken at any time and need not be in writing (THE CODE, §412-3), yet the party complaining must make his exceptions and point out the alleged error.
2. This court will not look into the testimony to see if the jury found a defendant guilty without sufficient evidence. This is matter addressed to the discretion of the court below on motion for new trial.
3. In fornication and adultery, the law does not require direct proof of acts of criminal intercourse to warrant conviction; but it is sufficient to show facts and circumstances that will satisfy the jury of the existence of such intercourse.

(*State v. Cowan*, 7 Ired., 239; *State v. Gallimore*, Ib., 147; *State v. Poteet*, 8, Ired., 23, cited and approved.)

INDICTMENT for fornication and adultery tried at Fall Term, 1884, of IREDELL Superior Court, before *Gilmer, J.*

The case states that "the evidence was entirely circumstantial and no act of criminal intercourse was proven by direct testimony."

His Honor, among other things not objected to by the defendants, charged the jury "that this was an offence usually committed in secret, and for this reason perhaps the law does not require the state to prove actual acts of illicit intercourse; but that the state was required to lay before the jury facts and circumstances that would fully satisfy them that the adulterous intercourse charged existed between the parties," and upon a return of a verdict of guilty, the court pronounced judgment upon the defendant Eliason of six months imprisonment and one hundred dollars fine. This was during the first week of the term, and the defendant asked the judge to defer the execution of the sentence

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for a few days during the term, in order that he might attend to some necessary business. The judge assented, but required the defendant to enter into recognizance with security for his appearance from day to day during the term.

Afterwards, towards the end of the week when the case was again called, the defendant asked the court to reduce the term of imprisonment, which His Honor did, making it three months. Thereupon the defendant appealed, assigning as error the instruction to the jury as set out above.

Attorney-General, for the State.

No counsel for defendant.

ASHE, J. We are unable to see from the statement of the case, or from anything occurring upon the hearing of the case before us, what was the ground of the exception taken to the charge of the court. It was the rule before THE CODE effected a change in the practice (§ 412-3), for the defendant to state his exceptions in writing, before the case was finally submitted by the judge's charge to the jury. And the only change made by THE CODE is, that the exceptions need not be taken at the time or in writing, and may be taken at the hearing in this court. But even in that case, the defendant is not relieved from the necessity of making his exceptions and stating in them some error to his prejudice. *Terry v. Railroad ante* 236; and *State v. Cowan*, 7 Ired., 239, where it is held that a defendant, in his exceptions, must show some error to his prejudice, otherwise the court will not set aside the verdict of a jury.

The supreme court will not look into the testimony to ascertain if the jury found a defendant guilty without sufficient testimony. A motion for a new trial on this ground is addressed to the discretion of the judge below. *State v.*

• • *Gallimore*, 7 Ired., 147.

In this case, the evidence offered by the state was entirely

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circumstantial, and the law laid down by His Honor in his charge to the jury was directly applicable to such a case.

It has been held that on the trial of an indictment under the statute (former statute,) for fornication and adultery, "it is not necessary to show by direct proof the actual bedding and cohabiting: it is sufficient to show circumstances from which the jury may reasonably infer the guilt of the parties." *State v. Poteet*, 8 Ired., 23.

There is no error. Let this be certified to the superior court of Iredell county, that the case may be proceeded with to judgment.

No error.

Affirmed.

 STATE v. J. D. STEWART.

Special Verdict—Obstructing road—User.

1. A special verdict which fails to find the defendant guilty or not guilty as the court may adjudge the law to be, upon the facts found, is defective.
2. The guilt of the accused must be passed upon by the jury, and though the verdict is dependent upon the opinion of the court as to the law, yet it is none the less a jury-verdict when the question of law is decided.
3. The special verdict in this case, rendered on a trial for obstructing a road, is also defective, in that, it does not find that the user of the road by the public was as of right and adversary.

(*State v. Wallace*, 3 Ired., 195; *State v. Moore*, 7 Ired., 228; *Boyd v. Achenbach*, 86 N. C., 397 and 79 N. C., 539; *Ray v. Lipscomb*, 8 Jones, 185; *State v. Bray*, 89 N. C., 480, cited and approved.)

INDICTMENT for obstructing a road, tried at Spring Term, 1884, of ROWAN Superior Court, before Gilmer, J.

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The defendant is charged with obstructing "a certain mill road and church road leading from the Gold Hill road in said county to the Stokes Ferry road in said county for the distance of two miles, said road being a mill and church road leading to and from St. Paul's church in said county, and to and from Miller's mill in said county, and used by the public as a mill and church road," and upon the trial of defendant's plea of not guilty, the jury rendered a special verdict in this form:

"The jurors find that for 35 or 36 years previous to the finding of this inquisition, there was a road used by the public, and leading to churches and mills and running for the distance of two miles from the Stokes Ferry road to the Gold Hill road, the last two named roads being public highways to and from the town of Salisbury; that the said road connecting the said last named public highways was used by the public without obstruction for said 35 or 36 years; that in October, 1883, the defendant built a fence and felled trees across the same, preventing all travel thereon by the public, the said fence enclosing a pasture on his own land; that on or about the 1st day of April, 1884, the defendant also, on his own land, placed obstructions on the said road at another point which prevented the public from passing over the same; that in order to pass from the Stokes Ferry road to the churches and mills aforesaid, it was necessary to go two miles farther than by the obstructed road, by reason of said obstruction; that this obstructed road was never worked by the public authorities, nor was any overseer ever appointed for the same"—omitting to find the defendant guilty or not guilty as the court may adjudge the law to be.

Upon this special finding the court adjudged that the defendant is not guilty, and from this ruling the state appeals.

Attorney-General, for the State.

Mr. John S. Henderson, for defendant.

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SMITH, C. J. The indictment is drawn under section 2065 of THE CODE, which declares that:

"If any person shall wilfully alter, change or obstruct any highway, cart-way, mill-road, or road leading to and from any church or other place of public worship, whether the right of way thereto be secured, in the manner herein provided for, or by purchase, donation or otherwise, such person shall be guilty of a misdemeanor, and fined or imprisoned, or both."

A preceding section (2062) provides for the laying out of roads "to and from any church or other place of public worship, for altering and discontinuing them by the board of supervisors in the several townships as may be conducive to the convenience of the public, and section 2065 throws around these the same protection which is accorded to the public highways, whether such as are laid out under the provisions of the act, or where the public right of user is acquired in some other way.

The verdict is fatally defective, and no judgment could be pronounced upon it, in that, it does not submit the facts found to the judge for his determination of the law arising thereon, and find the defendant guilty or not guilty as he may adjudge the law to be. The guilt of the accused must be passed on by the jury, and though dependent upon the opinion of the judge as to the law, is not less the verdict of the jury when the question of law is decided.

In the words of GASTON J., delivered in the opinion in *State v. Wallace*, 3 Ired., 195: "They (the jury) do find the defendant guilty, if in the opinion of the court he is guilty; and not guilty, if in the opinion of the court he is not guilty." *The finding one way or the other must be a finding of the jury, or the verdict is bad.*

A special verdict is in itself a verdict of guilty or not guilty, as the facts found in it do, or do not constitute in law

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the offence charged. RUFFIN, C. J., in *State v. Moore*, 7 Ired., 228.

Another equally serious defect in the form of the special verdict is in the omission to find that the user of the road by the public was *as of right and adversary*; for unless it was such it would not impose an easement upon the defendant's land.

If the use was *permissive*, it works no such injurious result to the ownership of the land. This is fully settled in *Boydén v. Achenbach*, 86 N. C., 397, and the previous cases cited in the opinion upon the authority of which that ruling is based. As was remarked by READE, J., when the same case was previously before the court (79 N. C., 539):

"In this country, where land cannot be cultivated without being enclosed, it would be a burden which farmers would not bear if they had to make lanes of every pathway which has been used over their land for twenty years."

And with equal force is the language of PEARSON, J., in *Ray v. Lipscomb*, 3 Jones, 185: "As was said in the argument, considering the state of things among us for many years past, in regard to one neighbor's passing over the unenclosed land of another, either on foot or on horseback, or with his wagon, any other conclusion would have resulted in great and general inconvenience."

We do not wish to be understood as holding the special verdict free from other imperfections, but we point out these as fully warranting the judge in refusing to pronounce judgment against the accused, if indeed the form of the indictment after a general verdict would justify him in doing so. For the reasons stated no judgment could be pronounced. There must be a new trial. *State v. Bray*, 89 N. C., 480.

Error.

Venire de novo.

STATE v. LEE.

STATE v. THOMAS LEE and others.

New Trial.

Upon being informed by the Attorney-General that he has examined the record and consents to a new trial, the court awards the same without looking into the record with a view of forming a judgment of its own. *State v. Valentine*, 7 Ired., 141, approved.

(*State v. Valentine*, 7 Ired., 141, *State v. Leak*, 90 N. C., 655, cited and approved.)

ORDER for new trial made at October Term, 1884, of THE SUPREME COURT.

The solicitor for the state and the counsel for the prisoners in the court below, joined in an application to the attorney-general to consent that a new trial may be granted in this case, stating that difficulties and inconveniences of a practical nature existed, to-wit, that counsel who prosecuted in the court below lived in different counties, the judge who tried the case was absent on another circuit, &c., and that in their opinion a correct statement of the case and assignment of errors could not be made in response to the writ of *certiorari* issued at the last term of this court. Thereupon the attorney-general examined the record and the matters submitted, and moved the court that the new trial be awarded.

MERRIMON, J. At the last term of this court the prisoners in this action suggested a diminution of the record, that the case for this court on appeal had not been settled according to law, and moved that the writ of *certiorari* be issued in their favor, commanding the clerk of the superior court

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to certify to this court a true and perfect transcript of the record, &c. The writ was granted returnable to the present term. *State v. Lee*; 90 N. C., 652.

The attorney-general now informs the court, that the case for this court upon appeal cannot for causes stated be settled, that he has carefully examined and considered the record, including the case as settled for this court by the judge before whom the case was tried in the superior court, and is of opinion that he ought not to ask that the judgment be affirmed, but that it is his duty to consent that a *venire de novo* be awarded.

The court, therefore, does not look into and consider the record with the view of forming any judgment of its own as to whether there be error or not, but will direct the judgment to be reversed, because the attorney-general, who represents the state as counsel in this behalf, admits and suggests to the court, that on account of the matters and things assigned by the prisoners for error, and for other causes appearing in the record, the judgment was erroneous and ought to be reversed, and a *venire de novo* awarded.

The attorney-general is an important and responsible officer, charged with grave duties, and among these is that of conducting actions, as well criminal as civil in this court, in which the state is interested. THE CODE, § 3363.

He is charged by the law with such duties; and it is presumed that he is qualified in point of ability and learning for the efficient and just discharge of them, and that he carefully considers and cares for the rights and interests of the state, while he pays a just regard to the rights of the citizen in all matters and cases.

When, therefore, he makes a suggestion to the court, as he has done in this case, he acts within the sphere of his official duties, and the court is warranted in the course it has taken.

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In what cases and how far the court might, for proper cause, refuse to act upon the request of the attorney-general in a case like the one before us, we need not now decide. We are very sensible that the present most excellent incumbent of that office has done in this case, what his judgment and conscience approve as lawful and just.

Our judgment in this case is fully sustained by that in the case of *State v. Valentine*, 7 Ired., 141. In that case Chief Justice RUFFIN, after referring to the course pursued in the court of King's Bench in like cases, said: "We suppose that our duty is much the same. For, as the judgment in the superior court is superseded by the appeal, so that no further proceedings can be had on the indictment, until this court shall have remitted the cause, the whole matter must necessarily be under the control of the attorney-general here, whether he will bring on the cause, or prosecute further; as he might thus discharge the prisoner, he may by consent allow the lesser benefit of a second trial." The case of *State v. Leak*, 90 N. C., 655, sustains the same view.

Judgment reversed, and a *venire de novo* awarded. Let this be certified to the superior court of Forsyth county, to the end that that court may proceed further in the action according to law.

Venire de novo.

STATE v. HENRY KENNEDY.

Homicide, evidence and judge's charge in.

1. Where the evidence showed that the prisoner could have escaped the threatened violence of the deceased, but slew him in the difficulty which ensued, and the judge charged the jury, "that if the

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prisoner was so situated that he could escape, but preferred to shoot rather than to escape, he would at least be guilty of manslaughter." *Held* no error, and the jury were warranted in returning a verdict of manslaughter.

2. The words "at least," &c., were used in the sense of "clearly a case of manslaughter," and did not present the case as one of murder or manslaughter—taken in connection with other parts of the charge and the prisoner's plea of self-defence.

(*State v. Floyd*, 6 Jones, 392; *State v. Tackett*, 1 Hawks, 210; *State v. Ellick*, 2 Winst., 56; *State v. Massage*, 65 N. C., 480; *State v. Harris*, 1 Jones, 190; *State v. Dixon*, 75 N. C., 275; *State v. Hill*, 4 Dev. & Bat., 491; *State v. Ingold*, 4 Jones, 216, cited and approved.)

INDICTMENT for murder tried at Spring Term, 1883, of LENOIR Superior Court, before *McKoy, J.*

The prisoner was indicted for the murder of Lewis Croom. At fall term, 1882, he was put upon his trial, but the jury failing to agree upon a verdict, there was a mistrial and at spring term, 1883, he was again put upon his trial. There was a verdict of manslaughter and judgment of the court, from which the prisoner appealed.

That part of the evidence produced on the trial and sent up as material to a proper understanding of the questions presented by the exceptions is as follows:

A witness, Robert Wright, testified that he was with the prisoner at the house of the deceased, that they went there for some fresh meat, as they had been notified that he had some for sale; they went in at the back door, and had some conversation, and the deceased's wife gave prisoner some cakes, and witness asked for and she gave him some cakes, and witness said to prisoner, "let us go home," and prisoner replied, "go on," that he would overtake witness, and the witness then went on, and after going thirty or forty yards saw prisoner coming and some one behind him running; that witness stopped in a cotton row, as it was in a cotton field, and got out of the path; that the deceased threw a

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brick-bat "right down" the path towards the prisoner; that there was a part of a brick-bat "right by the path;" that deceased went "right on;" the prisoner said, "stand back don't come on me;" the prisoner said that three times, and he further said, "if you come on me I will shoot you;" the deceased said, "shoot and be damned;" that the deceased went on, had another brick in his hand, about two-thirds of a brick, at least more than half a brick; that he got as close to prisoner as within ten feet of him, and the prisoner fired the pistol, and deceased came by witness running; that before the shot the deceased came by the witness running; that he stopped to get the brick-bat; he was in a half-walk and a half-trot; that he then slackened his pace, then the prisoner shot; there was a half brick two or three feet from his blood, and a pile of brick along the path between the house from which they came and where deceased fell after he was shot; that the brick found near the blood looked like it had been thrown. This witness was the only witness present at the time of the homicide.

There was evidence to show that the general character of the deceased was bad for violence, that he weighed one hundred and eighty, or one hundred and eighty-five pounds, that he had had his leg broken, but was as good a man after that as before.

There was other testimony as to the character of the ground where the deceased was slain.

The wife of the deceased testified, that after the prisoner left the house, she went out to get some wood, and she saw some one coming out from under the house of deceased; that he (her husband) came up and struck her, and started to kick her, and she left; that while going off, she heard a pistol shot; she then came back, and saw her husband shot in the eye.

There was much testimony circumstantial in its character, offered in corroboration, explanation and contradiction.

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There was no exception to the charge of the judge to the jury, nor was there any exception to the rulings of the court upon questions of evidence. The jury retired to consider of their verdict, and after having been absent for some time, came into court, and upon being asked if they had agreed upon a verdict, answered that they had not. A member of the jury, speaking for the jury in the presence of the prisoner and his counsel, in open court, asked: "How far a man would have to run in the street before he would be pressed to the wall?" The court replied that, "that was a question of fact for your common sense under the law as laid down by the court." The court said further, "If a man were pressing upon another in the street with a shot-gun, then the man thus pressed, would be put to the wall. Or, if a man were pressing upon another with a pistol, and it was as dangerous to flee as to stand, then he would be put to the wall. But if one were pressing upon another with a brick in an open field, that would not be putting him to the wall, if the one assailed could escape, unless the assault was fierce and sudden the shot which slew the deceased was fired during excitement and surprise, and then the prisoner would be guilty of nothing. But, if so situated that he could escape, but he preferred to shoot rather than to escape, then he would at least be guilty of manslaughter."

To the latter charge the prisoner excepted and appealed from the judgment pronounced.

Attorney-General, for the State.

No counsel for the prisoner.

MERRIMON, J., after stating the above. The exception of the prisoner fails to specify any particular ground of objection to the instruction of the jury complained of, and as we were not favored with an argument in his behalf, we are left to see whether in any aspect, it can be sustained.

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It seems that the defence relied upon was that of self defence, and it was insisted first, that the evidence produced on the trial did not warrant the instruction excepted to, and secondly, that if it did, and the jury should find the facts to be as supposed by the instruction, the prisoner was not guilty of manslaughter.

The court, in reply to an inquiry by the jury, after stating several propositions of law bearing upon the evidence, to which there was no exception, said, "But, if so situated that he could escape, but he preferred to shoot rather than to escape, then he would be at least guilty of manslaughter."

We think that the prisoner has no just grounds of complaint at this instruction. It was a favorable statement of the law for him, and the evidence was such as that it was the duty of the court to submit it to the jury in the aspect of manslaughter.

Manslaughter, at the common law and in this state, is the unlawful and felonious killing of another without malice, either express or implied. It is the absence of malice that distinguishes it from murder. Murder is of malice in a wicked heart. Voluntary manslaughter arises from sudden heat of passion. Manslaughter is divided into two branches: First, it is voluntary, as where one slays another without any malice on a sudden quarrel, or in the heat of passion; secondly, involuntary, as where one, while doing some unlawful act, unintentionally kills another; or while doing a lawful act in an unlawful way, without due caution and circumspection, kills another. And generally, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act that occasioned it. If the killing be done in the prosecution of a felonious intent, or if the act done naturally tended to bloodshed, it will be murder, but, if no more was intended than a mere civil trespass, it will only amount to manslaughter. 4 Bl. Com., 191; Am. Law of Hom., 35 (1st Ed.).

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If two persons upon a sudden quarrel fight, and one kill the other, it is voluntary manslaughter, *State v. Floyd*, 6 Jones, 392, because the slaying is of the heat of passion, and not of malice. So also, if a man be greatly provoked, as by pulling his nose, or slapping his face, or other like great personal indignity is offered him, and he at once slays the aggressor, this is not excusable, *se defendendo*, because there is no absolute necessity to do it to protect himself; it is manslaughter. It was said in *State v. Tacket*, 1 Hawks, 210, "that if an assault, made with violence or under circumstances of indignity upon a man's person, be resented immediately by the death of the aggressor, and he who is assaulted act in the heat of blood and upon that provocation, it will be manslaughter." So also, it was said in *State v. Ellick*, 2 Winst., 56, that if A is about to strike B, who is unwilling to enter into the fight and shows such unwillingness by words and actions, or otherwise, by going back, or warns A not to strike, and A presses on and strikes, or attempts to strike, and thereupon B kills with a deadly weapon, it is manslaughter, for there is a legal provocation, and the law ascribes the killing to "heat of blood," and not to malice. To the like effect is *State v. Massage*, 65 N. C., 480.

It is certainly true, as a general rule, that where one is attacked by another who intends to murder him, he may, if need be, kill the assailant, and he would in such case be justified, and where the attack is made with murderous intent, the person attacked is not bound to flee, but he may stand and kill his adversary if need be. *State v. Harris*, 1 Jones, 190; *State v. Dixon*, 75 N. C., 275, and cases there cited. But this rule does not apply in cases where the attack is a mere assault. In such case, the person assaulted shall not stand and kill his adversary, if there be a way of escape for him, but he may be allowed to repel force by force, and give blow for blow. 2 Bish. Crim. Law, § 633 *et seq.*, *State v. Dixon*, *supra*.

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To reduce homicide to the degree of self-defence, it must be shown, that the slayer was closely pressed by the assailant, and that he retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault. The jury must be satisfied that, unless he had killed the assailant, he was in imminent and manifest danger, either of losing his own life, or suffering enormous bodily harm. 4 Greenl. on Ev., § 116; Am. Law Hom., 36, 212; *State v. Hill*, 4 Dev. & Bat., 491.

In case of mutual conflict, in order to establish the defence of self-defence, it must appear that the party killing had retreated either as far as he could by reason of some interposing obstacle, as a wall, or the like, or as far as the fierceness of the assault would allow. There may be cases, though they are rare, and of dangerous application, where a man in personal conflict may kill his assailant without retreating to the wall. The assault in such case must have been so fierce as not to allow the person assailed to yield at all without manifest danger to his life, or of enormous bodily harm; then if there be no other way of saving his life, or avoiding such harm, he may kill his adversary instantly. The recognized distinction between this kind of homicide and manslaughter is, that here the slayer could not escape if he would; in manslaughter he would not escape if he could. Am. Law Hom., 213.

It has been held in a case where, in the course of a quarrel, the prisoner was menaced by the deceased, (whose strength was greater than his own) with a brick-bat, and the prisoner could have escaped by flight, but choosing to do so, turned around and mortally wounded his assailant with a dagger which he had concealed on his person, that the prisoner was guilty of manslaughter. *People v. Anderson*, 2 Wheeler's C. C., 408; *People v. Garratson*, *Ib.*, 348; Am. Law Hom., 214.

Now, applying these principles of law to the case before

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us, it is very clear that if the facts of the case were as supposed by the instruction excepted to, the prisoner was guilty of manslaughter. It cannot be said that he was in imminent danger of losing his life, nor was he about to suffer enormous bodily harm. The deceased did not strike or hit the prisoner; he threw one brick-bat in the direction the latter was going; he picked up another and pressed on after the prisoner, but it does not appear that he threw or offered to throw it at him; he slackened his pace as he approached; and the prisoner having warned him to stand back and not to come on him, fired the fatal shot. It does not appear at all that this was necessary to save his life or his person from great, much less enormous bodily harm. Nor does it appear that anything stood in the way to prevent his escape. There was an open field about him. He might have escaped so far as appears, if he had desired to do so. Besides, he was armed with a most effective deadly weapon, a pistol. He did not kill of necessity, nor were the circumstances such as that he might stand and fight and kill. No man is justified in such a case where he can escape, if he chooses, prefers, to shoot and kill. He may not kill of choice; he can only be justified when he kills of necessity.

So that, if the facts were that the prisoner could have escaped the threatened violence of the deceased, but he preferred to shoot him rather than escape, he was guilty of manslaughter.

The evidence certainly warranted the instruction in question. It was far from developing a case of manifest self-evidence. In view of the evidence, the verdict of manslaughter was not unreasonable. It tended to show, though not very clearly, that the deceased suspected that the prisoner but a few minutes before the homicide, had been too intimate with his wife, and as soon as he left the house of the deceased, the latter left his secret place of observation, struck his wife, and at once hurriedly pursued the prisoner

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some distance in the open field, throwing a brick-bat towards him. It does not appear that it reached or hit him. That continuing to move on rather hurriedly, he picked up a second brick-bat, still moving on towards the prisoner in something more than a walk, when the latter said to him three times, "stand back, don't come on me;" and further said, "if you come on me I will shoot you;" that deceased said, "shoot and be damned"—moving on, and having the brick-bat in his hand. It does not appear that he offered to throw it, until he got within ten feet of the prisoner, slackening his pace as he approached him, when the prisoner fired the fatal shot.

The jury might well find from the evidence that the assault was not so fierce as to imperil the life of the prisoner, or expose him to enormous bodily harm, and that he did not slay the deceased of necessity. If it be granted that he had legal provocation, he being armed with a pistol, his warning, and the defiance of the deceased, and the absence of any effort to escape the threatened violence, went strongly to show that he killed the deceased of choice, and not of necessity.'

In the instruction under consideration the court said that, if the facts were such as supposed, then the prisoner would be "at least guilty of manslaughter." The words "at least" were used in the sense of *clearly*, a case of manslaughter. It does not appear that they were emphasized, or intended to imply any view of the court unfavorable to the prisoner, and in connection with the other instructions then just given, they did not leave the impression on the minds of the jury, that the court thought the case one either of murder or manslaughter, and thus prejudice the prisoner before the jury. They were not used, and could not reasonably be construed, as the same words were in the case of *State v. Ingold*, 4 Jones, 216. In that case they were so used as to lead the jury to infer that the court inclined to the opinion

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that it was murder, taking the case in its most favorable aspect. No such inference could reasonably be drawn in this case.

The judgment must be affirmed. Let this opinion be certified, to the end that the court below may proceed further in the action according to law. It is so ordered.

No error.

Affirmed.

 STATE v. EATON MILLS.

Juror—Tenant by the courtesy—Middle name—Evidence, dying declarations—Declarations of prisoner before and after the act—Confessions of witness.

1. A tenant by the courtesy initiate is a freeholder in the sense of that term as applicable to the qualification of jurors.
2. The name of J. L. B. summoned as a juror, was entered on the scroll as "J. S. B.;" *Held* to be immaterial, since the use of a middle letter forms no part of the name.
3. A juror upon *voire dire* stated that he had said it would injure any attorney politically with certain persons to appear for the prisoner, and the prisoner's counsel asked him to name them; *Held* that the court properly ruled, that to know the names of those persons was not material to the question of the juror's indifference.
4. Where the deceased said repeatedly, "I am bound to die, I am shot in the side and back, and am bleeding internally," and then said he was shot by the prisoner, and died of the wounds in a few days afterwards; *Held* admissible as dying declarations, notwithstanding that a physician, between the time the declaration was made and the death, used language to the deceased calculated to inspire the hope of recovery.

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5. Evidence showing that the railroad track was near the place of homicide, and that the "fast train" passed soon after the shooting, was properly admitted in connection with the circumstances attending the alleged homicide.
 6. A declaration of the prisoner made a few hours before the homicide, to the effect "that he intended to have satisfaction before he slept that night," was pertinent to the issue and admissible against the prisoner.
 7. What the prisoner said after the homicide is not admissible for him, because the declaration is not a part of the *res gesta*.
 8. The confession or declaration of a witness made before the trial of another for crime, may be proved to contradict his testimony on such trial; and this, even although the declaration was made under improper influences. What weight is to be given to the declaration is a question to be determined by the jury. Distinction between confessions previously made by the party charged and confessions of a witness not on trial, introduced to discredit the witness, pointed out by ASHE, J., and the rules of evidence governing the admissibility of the same; discussed.
 9. Where such declaration offered to contradict is directly material to the issue, it is not necessary to ask the preliminary question to call the witness' attention to it. This is only necessary where the testimony relates to some collateral matter or some act showing the witness' partiality or prejudice towards a party to the action.
- (*Houston v. Brown*, 7 Jones, 161; *Wilson v. Arentz*, 70 N. C., 670; *State v. Ragland*, 75 N. C., 12; *Wall v. Hinson*, 1 Ired., 276; *Flanniken v. Lee*, Ib., 293; *State v. Simmons*, 6 Jones, 309; *State v. Bryson*, 2 Winst., 86; *State v. Tilly*, 3 Ired., 424; *State v. Scott*, 1 Hawks, 24; *State v. Brandon*, 8 Jones, 653; *State v. McQueen*, 1 Jones, 177; *Jones v. Jones*, 80 N. C., 256; *State v. Davis*, 87 N. C., 514; *Radford v. Rice*, 2 Dev. & Bat., 39, cited and approved.)

INDICTMENT for murder tried at Spring Term, 1884, of HALIFAX Superior Court, before *Avery, J.*

The prisoner was indicted for the killing of one Henry Ponton by shooting him with a pistol on the fifth day of November, 1888.

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Exception 1, 2, 3, 4. The facts relating to exceptions to jurors are stated in the opinion.

Sam Jarrett, a witness for the state, testified that he knew the prisoner, and knew when deceased was shot, and that he saw the prisoner get off the 4 o'clock train at Halifax the evening of the day the homicide was committed.

G. H. McDaniel testified for the state that he knew the prisoner and the deceased; that prisoner had pawned his pistol to the witness for whiskey and came into his shop about dark on the evening of the homicide and asked witness for the pistol and whether it was loaded. Witness replied that it was just as he had left it. He seemed excited and took a drink and witness gave him the pistol. Witness kept a bar about 400 yards from Bob Daniel's store, and about 700 yards from Parker's gin-house.

Henry Purnell testified that he was in the town of Halifax in the evening before deceased was shot at night; that he saw the prisoner, his son John Henry Mills and Columbus Cook talking near Bob Daniel's store; that John Henry Mills was prisoner's son; that he saw prisoner laying off his hands and heard prisoner say, "we'll get him;" that one of the others replied, but witness did not hear what he said; that prisoner said Henry had done something, but witness did not understand what; it was then about sun down, and witness stopped when he heard prisoner mention Henry (witness' name being Henry), and then the prisoner and the other two began to whisper.

Witness further testified that after he went into Daniel's store, Henry Ponton, (the deceased) came in and handed Mr. Grizzard some money to change, and that prisoner came in soon after Ponton, and threw his arms around him and asked Ponton where he had been all day; that he had been looking for him all day. Ponton said, "what do you want?" Prisoner said, "I want to get $\frac{1}{2}$ pint of whiskey and I want you to drink it all. I want you and me to have a damned

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big time." Prisoner then went back into the bar-room, the back room of the store. Ponton stopped to talk with witness and prisoner came back and said, "come on and let us take a drink, don't take up time to talk with Jesus Christ, when I am talking to you." Witness further testified that he remained in the front room of the store a half hour later, and in coming up street, heard some one calling Henry Ponton in front of Eliza Price's restaurant about 15 steps from Daniel's store; saw it was Eaton Mills. Witness heard Eliza Price say: "some one is calling you." Witness then saw prisoner and deceased go arm in arm towards Daniel's store, but could not see whether they went in or passed on. It was then "good dark," but witness recognized both. Henry Ponton is now dead.

Tom Ousby testified that he kept a bar-room in the back of Daniel's store in the same building. Ponton passed through a middle door from Daniel's store to the bar kept by witness. Prisoner came in about 3 o'clock in the afternoon that deceased was shot, and paid an account due to witness, and went out. Prisoner and deceased came in about dark or a little before. Prisoner bought a half pint of whiskey and filled two glasses. Ponton drank one, but prisoner did not touch the other. Prisoner made witness fill Ponton's glass again and Ponton drank it. Prisoner told Ponton to go and drink and not to wait for him. The prisoner then insisted that Ponton should drink the glass poured out for him (prisoner). Ponton said: "No, I don't want any more, I have enough. Give it to Mr. Manney." Prisoner said, "No, drink it yourself, I don't want to treat any body but yourself." J. E. Manney was present, sitting in the bar-room; Columbus Cook was standing with one arm on the bar; John Henry Milla was sitting behind the middle door in the bar-room, and near a stove.

After deceased and prisoner got through, they walked arm and arm by the store and sat on some empty beer crates.

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Prisoner said : " We are the best friends in the world, ain't we ? " Witness was called by a Mr. Lancaster, who said that Daniels had gone home. Henry Ponton then got up and walked out. Witness went out to see Mr. Daniels, and saw Mr. Daniels and deceased talking near the front door, and after he spoke to Mr. Daniels he met the prisoner about half way in Daniels' store going towards the front door ; he also met John Henry Mills coming through the middle door, and as witness passed into the bar-room, Columbus Cook went towards the front door across the store. About five minutes later witness opened a side door and saw two persons going towards Parker's gin, and took them for Columbus Cook and John Henry Mills. Witness then went in and shut the door. In about 5 or 10 minutes after he shut the door, he heard a pistol fire twice. In a second a man ran by the door and said : " Some one is shot down there. " The shots were fired in the direction of Parker's gin. Witness opened the back door again and saw some one coming from the direction of Parker's gin saying, " Oh ! Oh ! " He went to meet him, J. M. Grizzard, Jr., following witness. He was running fast when witness first saw him. He was on his knees when witness got to him, and was in 25 steps of the store. Witness said : " Is that you, Henry ? " Deceased said : " Yes, sir. I am dying, I am dying. I have been shot three times. I am bound to die. The shot is inside of me, and I am bound to die. " Witness was looking at the wound on the head, and when deceased first said, " I am dying, " witness said, " I reckon not. " Deceased then said : " I am bound to die. The shot is inside of me. " Deceased then said : " Please do something for me, I am shot all to pieces. " Witness afterwards saw three holes, one in his temple, another in his side and a third in his back. Witness went for a doctor ; saw the wounds after the doctor had examined him. After he returned with the doctor, he heard deceased say

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again and again, "I am bound to die. I am shot three times. I am dying."

5th exception. The solicitor offered to show the declarations of the deceased, made after the witness returned with the doctor and after deceased said repeatedly, "I am dying," "I am shot three times." Prisoner objected. The objection was overruled, and prisoner excepted.

The witness then testified as follows:

After the deceased said "I am dying," he said "Eaton Mills asked me to go to Bob Daniels to get supper with him. We were going on together arm in arm, and Eaton took his pistol and put it right to my face and shot me for nothing."

Witness asked deceased where it occurred? Deceased said: "Right down there at Mr. Parker's gin." Deceased said also, "that just as he got down there he saw two other men in front of Parker's gin." Deceased was coming from the direction of Parker's gin when witness saw him.

Daniel's store is about 200 yards from Parker's gin. Daniel's dwelling is about 300 yards beyond Parker's gin and 500 yards from the store. The gin is on the path leading from his store to his dwelling house. Persons usually travel that path instead of the road in going from his store to his house.

There is an old railroad track just in front of Parker's gin and within 75 yards of Parker's gin.

6th exception. On cross-examination prisoner proposed to show by the witness, that the person that ran by and said: "Somebody has shot somebody" was Washington Johnson and that Washington Johnson said also that the shooting occurred near Parker's gin. The reason given for offering the testimony was, that Washington Johnson was summoned for the state, and would probably be introduced as a witness (though he had not then been introduced) and the testimony was offered to contradict him. Objection for the state was sustained, and prisoner excepted.

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7th exception. W. T. Parker testified for the state that as he was coming back from supper on the night referred to by other witnesses, and heard a noise in Eliza Price's shop; he went in and found Henry Ponton there. Deceased said that he was shot in the side and back, and was going to die; that the shot in the back was hurting worst; and he was bleeding internally from that, and was bound to die. He did not say anything further that witness recollects. The prisoner objected to proof of declarations then made by deceased. The objection was overruled, and prisoner excepted.

The witness further testified as follows: "Just after deceased said that he was bound to die, witness asked him who shot him. He replied that Eaton Mills shot him; witness said, "what for?" Deceased said, "nothing."

Eaton Mills was not arrested till some time after that. A reward was offered for him by the governor before he was arrested. Parker's gin was in about 100 yards of the track now used by the Wilmington and Weldon railroad company.

8th exception. The solicitor proposed to show by the witness that the "fast train" on said railroad passed soon after the shooting. The testimony was offered to be considered in connection with the other evidence, that prisoner, his son and Cook, were seen talking together and what was said; that prisoner afterwards tried to make deceased drink three glasses of liquor; that Cook and John Henry went up the path after dark, and prisoner followed arm in arm with deceased, and that pistols were fired about Parker's gin, as tending to show a purpose on the part of the prisoner to kill deceased and place him on the railroad track before the train should pass. Objection was overruled and prisoner excepted.

Witness further testified that the "fast train" arrived at that time about one-half or three-fourths of an hour after

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dark, but had not yet passed, when witness came back from supper and saw deceased at Price's shop. It was then about time for the train to pass.

R. H. Daniel testified that he went home from the store on the night when deceased was shot, saw prisoner and deceased at his store just before leaving for his dwelling; that he had just reached his front gate, when he heard two or three pistol shots. After the witness reached home, he heard a noise in the back yard, went out and saw Eaton Mills with a pistol in his hands, and ordered him to leave. This occurred about 15 minutes after witness reached home. It was just before the time for the fast train to pass.

9th Exception. Washington Johnson testified, that he met prisoner and deceased on the path leading from Daniel's store to his house on the night when the shooting occurred. They were going arm in arm towards Daniel's. Witness heard pistol shot some minutes after he passed them, and after the second shot the witness heard deceased cry out "Oh! Lord, you have killed me, don't let that man shoot me any more."

10th Exception. John H. Ponton testified for the state that he saw Eaton Mills the day previous to the killing, in Weldon. The solicitor was allowed to prove by this witness, that he saw Eaton Mills, Columbus Cook and John Henry Mills together in Weldon in the afternoon before deceased was shot; that he heard Eaton Mills say to Columbus Cook, that he had money enough to pay him out of all his difficulties, and he intended to have satisfaction before he slept that night, and that witness saw all three of them get on the train going towards Halifax from Weldon soon after he heard that. The prisoner objected to the competency of the testimony, but the objection was overruled, and prisoner excepted.

11th Exception. Dr. Ferguson testified for the state, that he had been a practising physician for over two years, and

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went to see deceased after supper, and first heard deceased say he was dying, that he was shot all to pieces, that he had been shot three times and the wound was bleeding internally. He said to witness that he could not live. Witness does not recollect if he asked witness if he could do anything for him. He did not ask witness if he was then dying. Witness tried to encourage him, when deceased said to witness that he was bleeding internally and could not live. Just after that he made a statement about the shooting.

Prisoner's counsel objected to proving the statement as a dying declaration, and the objection was overruled. Prisoner excepted.

Deceased said to witness that Eaton Mills took him off from the store in a very friendly manner walking arm in arm, and when they got to the old railroad track near Parker's gin, prisoner stopped, and the first thing he (deceased) knew, Eaton Mills had a pistol pointed at his eyes, and fired before he could get away, and shot him three times; that he fired twice before he (deceased) got loose and ran, and that he fired the fatal shot as he (deceased) was running.

Witness further testified that deceased died from secondary hemorrhage caused by the wound in the back.

On cross-examination, the witness testified that on Friday, two days after deceased had been wounded, he encouraged deceased and told him he thought he might get well, and deceased seemed more cheerful, and said he was better; that witness had not then examined the wound in the back. Prisoner's counsel then moved the court to rule out all proof of dying declarations shown by the witness to have been made on the night he was wounded. The deceased died on the Friday following. The motion was refused, and prisoner excepted.

12th Exception. John Henry Mills was introduced for the prisoner, and testified as follows: Witness and Columbus Cook were tried for killing deceased, and were acquitted.

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On Wednesday he went to Weldon to get some money from his father (the prisoner) and then he and Columbus Cook went with the prisoner to Halifax before sunset. He was in Bob Daniel's store, and was also in Ousby's bar-room; started with Columbus Cook to Mr. Daniel's house and on the way passed Parker's gin. They stopped at Parker's gin and while they were at the gin the prisoner passed along the path alone. He passed very near to them but did not appear to see them.

There was fire in the engine and witness lighted a cigar after prisoner passed. Prisoner was walking very fast towards Bob Daniel's, and had gotten about fifty yards from witness on the path when witness heard something like a rock thrown against a tree. He then heard something like a scuffle and he and Cook started towards where they heard the noise. He met some one before he got to prisoner, does not know who it was, but heard him say, "Oh! you've shot me." He was coming towards the town. Witness was in about two yards of the railroad track, when the man passed.

After that, witness and Cook went on and found prisoner just on the other side of the old railroad in the path going to Mr. Daniel's. Witness had heard the report of three pistol shots before he reach his father.

The prisoner proposed to show by the witness, what prisoner said about the shooting and how prisoner said it occurred, as a part of the *res gestæ*. Objection by the state was sustained, and prisoner excepted.

The witness further testified that prisoner had a scar on his forehead, and that he felt something like blood on his forehead.

The prisoner testified (among other things not material), that as he was going along the path, he was suddenly assailed by deceased with a deadly weapon and knocked down, and that he shot deceased while lying on his back.

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13th Exception. Garland White testified for the prisoner, that he is a minister of the gospel and has been for thirty years. Counsel for the prisoner proposed to ask this witness the following question: "During the last thirty years have you, as a minister, been often at the death-bed of people of your race (colored) and heard their dying declarations?" "If so, do you think from your observation and experience that you can estimate the weight that should be given to such declarations of colored people *in extremis*?" The solicitor objected. Objection sustained. Exception.

14th Exception. J. H. House was introduced as a witness for the state in reply, and testified that while acting as deputy sheriff, he arrested John Henry Mills (who was examined as a witness for prisoner). He was arrested on the charge of the killing of Henry Ponton. He arrested him near Littleton; several men were along but there was no violence, and no display of arms, and that no threats were at any time made against him, nor were any inducements offered to him to make a statement. John Henry Mills has since been tried and acquitted of the charge. After witness arrested him, he was riding behind witness on his horse, and some other persons were along, when John Henry Mills said to witness, "I want to speak to you, pull your horse back." He said, "Mr. House, is a man responsible for what another man does?" He said he wanted to tell witness something, and hesitated. Witness said to him, "I reckon it would be the best for you to make a clean breast of it." The solicitor proposed to offer the declarations of John Henry Mills then and there made, not as substantive testimony against the prisoner, but to contradict the testimony of said John Henry on behalf of the prisoner. The court admitted the testimony, after objection by the prisoner, for the purpose only of contradiction, and instructed the jury, that it was to be considered only as tending to show the circumstances under which deceased was wounded.

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Witness then testified, that the witness John Henry Mills told him, that Cook came for his father, and his father went to Littleton for him (John Henry) and his mother objected to his going; that he and the prisoner and Cook went to Weldon, thence to Halifax, and found Ponton and went around drinking with him, and that he and Cook left them in a bar-room and went on to an engine; that in a few moments deceased and prisoner came along, walking arm in arm, and passed near him and Cook; that they had gone but a short distance, when prisoner shot Ponton, and Ponton said: "Oh! Eaton, you've killed me! What did you shoot me for?" The deceased got up and ran, and Eaton shot him the third time; at that time prisoner came to them and said: "I have killed the d—d scoundrel, and now I want to kill Olive Perkins;" that prisoner proposed they should go with him; that they ran off to the railroad and hid in the bushes and took the train for Weldon soon after; that he did not see prisoner for several days, and prisoner sent for him and his mother and said, that either he (the prisoner) or John Henry must leave the country; that he wanted him (John Henry) to leave, but his mother objected and told prisoner he must leave.

It was admitted by the solicitor that if Hulda Williams was present, she would testify in behalf of the prisoner, "that the prisoner was at her house about seven miles from Halifax, on Friday morning after deceased was mortally wounded, and that the prisoner was then severely wounded on the forehead.

The jury found the prisoner guilty and from the judgment pronounced, the prisoner appealed.

Attorney-General, for the State.

No counsel for prisoner.

ASHE, J. We have examined the record in this case with

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that care which is due to the consideration of the serious crime with which the prisoner is charged. He has filed a great many exceptions, some of which are perfectly frivolous, but to such as are worthy of consideration we proceed to give the conclusions to which we have been led.

1. The exception to the ruling of the court, that the juror was a free-holder, who had married a woman seized of land, and had children by her born alive, cannot be sustained. The record does not show when the marriage took place, nor does it show whether the juror was summoned on the original panel or on the special *venire*. If on the original panel, he was not required to be a free-holder, (THE CODE, § 1722), and in that case, though there might have been error in the ruling, it could not have prejudiced the prisoner.

If he was married and the land acquired by his wife before the adoption of the constitution of 1868, called the "marriage act," he was a tenant by the courtesy initiate notwithstanding the act of 1848. *Houston v. Brown*, 7 Jones, 161. And if he was tenant by the courtesy initiate, he was necessarily entitled to the possession. *Wilson v. Arentz*, 70 N. C., 670. And if entitled to the possession, he had a right to the perrancy of the rents and profits, and that in contemplation of law made him a free-holder, in the sense of that term as applicable to the qualification of jurors, although he might not be seized of the legal estate. *State v. Ragland*, 75 N. C., 12.

The court held the juror was a free-holder and we must presume he was either a juror on the original panel or a tenant by the courtesy initiate; for unless the appellant distinctly points out the error sought to be reviewed, this court will presume the ruling of the court below to have been right. *Wall v. Hinson*, 1 Ired., 276; *Flanniken v. Lee*, *Id.*, 293.

2. There is no force in the objection that the name of J. L. Butt, summoned by the sheriff as a juror, was entered on a scroll as "J. S. Butt." "J." was the initial of the

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first christian name in both, and the initial of the second christian name is unimportant. It is held that the use of a middle letter forms no part of the name. Roscoe's Crim. Evi., 81, note 1, and *McKoy v. Speck*, 8 Texas, 376; *King v. Hutchins*, 8 Foster, 561; *Oskin v. Davis*, — Ill., 257; 14 Barb., 259. The objection came too late. It should have been taken before the name of the juror, who seems to have been summoned on the special *venire*, was put in the box, *State v. Simmons*, 6 Jones, 309, and in no way could the prisoner have been prejudiced, for there was no such man in the county as "J. S. Butt."

3 and 4. When a juror examined on his *voire dire* replied to a question asked him, "that he had said it would ruin or injure any lawyer politically with certain persons in the county to appear for the prisoner," and the juror was asked by prisoner's counsel to name them, the court very properly held that it was not material upon the question of fairness of the juror to know these names. It seems to have been the object of the prisoner to introduce politics into the jury box, and it was clearly the duty of the court to exclude any such influences from the jury.

5, 7, 9 and 11. There is no merit in the exception to the ruling of the court in receiving the dying declarations of the deceased.

The rule for the admission of such testimony is thus laid down in Taylor on Evidence, § 648: •

1. "At the time they were made, the declarant should have been in *actual danger* of death. 2. That he should have a full apprehension of his danger; and 3. That death should have ensued."

From the time the deceased was shot, up to the time he made the declaration as testified to by the witness Ousby, he was heard repeatedly to say, "I am bound to die." He told the witness Parker that he was shot in the side and back, and was bleeding internally, and "was bound to die."

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Before the declarations of deceased as testified to by Dr. Ferguson, on the night of the shooting, deceased said to witness that he "was dying;" that "he was shot all to pieces; that he had been shot three times and the wound was bleeding internally, and he could not live." This witness, on cross-examination, stated that on Friday, two days after the shooting, he told the deceased "that he thought he might get well, and deceased seemed more cheerful and said he 'was better,'" that the witness had not then examined the wound in the back; that the deceased died, from secondary hemorrhage caused by the wounds, on the Sunday following.

The prisoner's objection to the admission of the declarations seemed to have been founded upon the fact that the physician, two days after, gave hopes of recovery to the deceased by telling him he thought he might get well. However that might have been, it did not affect the admissibility of the testimony. The deceased was manifestly in the *apprehension of impending death* when he made both the declarations. He was in the actual danger of death and did die from the effects of the wounds.

This sufficed to make the declarations admissible, and no hope of recovery subsequently inspired could render them incompetent. *State v. Tilghman*, 11 Ired., 5513.

6. The objection to the rejection of testimony to contradict the witness, Washington Johnson, before he was examined, is too frivolous.

8. There is nothing in the exception to the admission of evidence that the "fast train" on the railroad passed soon after the shooting and the track was near the gin-house when the shooting was done. It was offered in support of the theory entertained by the solicitor that the prisoner, assisted by his son and Cook, proposed to kill the deceased, and place his body on the track. Whatever may have been the motive of the prisoner in conducting the deceased, after plying him with whiskey, to the gin-house, which stood not

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far from the railroad track, and then shooting him in the presence of his son and Cook just before the train was to pass, the theory is not without probability, and there was no error in receiving the evidence.

10. The state was allowed to prove that prisoner and John Henry Mills and Columbus Cook were seen together in Weldon in the afternoon of the day the deceased was shot, and the prisoner was heard to say to Columbus Cook, "that he had money enough to pay him out of all his difficulties, and he intended to have satisfaction before he slept that night," and afterwards all three of them got on the train going from Weldon to Halifax. The declarations of a prisoner are always evidence against him when pertinent to the issue. *State v. Bryson*, 2 Winst., 86. Here was a declaration involving a threat, and in a few hours the deceased was shot by the prisoner. The most reasonable inference is, that the threat was made against the deceased. The evidence was clearly pertinent and admissible.

12. The prisoner, in defence, offered to prove a statement made by him soon after the shooting as to how it occurred, but it was properly ruled out by the court. No declarations of a prisoner made after the commission of a homicide, as to the manner of the transaction, that are not of the *res gestæ*, are admissible. *State v. Brandon*, 8 Jones, 463; *State v. Tilly*, 3 Ired., 424; *State v. Scott*, 1 Hawks, 24. The statement of the case excludes the idea that they were of this nature. The declarations proposed to be proved were after the act was past and done.

13. The prisoner, to impeach the dying declarations of the deceased, proposed to prove by one Garland White, a minister of the Gospel, what weight was to be attached to the dying declarations of colored persons *in extremis*. The court properly ruled it out. This exception needs no comment.

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14. The last exception taken by the prisoner was to the declarations of John Henry Mills when he was arrested by the sheriff under a charge of the state for killing Henry Ponton, the deceased, for he had been tried for that offence and acquitted. This evidence was offered by the state, not as substantive evidence, but for the purpose of contradicting the testimony which John Henry Mills had given in behalf of the prisoner on the trial of this case. The testimony we think was competent for that purpose.

The ground of that objection is not stated, but we presume it was upon the ground the statement made by John Henry Mills to the witness, the deputy sheriff, when he was arrested, was made under the influence of hope excited by the remark of the officer "that he reckoned it would be best for him to make a clear breast of it."

We are not prepared to say but that the declaration made under those circumstances would have been inadmissible as a confession upon the trial of the prisoner for the crime, in reference to which the declaration was made, as tending to implicate himself. But we think there must certainly be a distinction between a declaration offered in evidence as a *confession* of a crime against a person charged therewith, and the declaration when offered solely for the purpose of contradicting the testimony of the declarant given as a witness on the trial of another.

"A confession is the voluntary declaration by a person who has committed a crime or misdemeanor, to another of the agency or participation of which he had in the same." Bouvier's Law Dictionary.

The confession must be voluntary. It is well settled that if induced by the flattery of hope or the torture of fear, it is inadmissible.

This is a rule adopted by the humanity of the criminal code, in its tenderness for human life, exclusively for the benefit of the accused, upon his trial for the crime confessed,

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to guard him against the possibility of the danger of falsely implicating himself from a motive of hope or fear.

But the principle of the rule has no application to the declaration, when offered in evidence to contradict the testimony given by the declarant in his examination as a witness on the criminal trial of another. In that case the credibility of the witness is alone involved, and it is a question for the jury to determine, whether his testimony is affected by the contradictory evidence; and if so, to estimate the extent to which it has been impaired by the contradiction, taking into consideration all the circumstances of the case, the hopes, the fears and all influences that might have been employed, to induce the declaration.

If the fact that the preliminary question was not put to John Henry Mills before the contradictory evidence was offered, was a ground of objection to the evidence, it is not tenable. For the declaration offered in evidence to contradict him was directly and immediately material to the issue, and in such case it was not necessary to ask him the preliminary question to call his attention to the statement offered to contradict. That is only necessary where the testimony of the witness relates to some collateral fact, or some act of his tending to show his bias, partiality or prejudice towards one of the parties to the action. But where the testimony relates directly to the subject of litigation, it may be met by evidence of contradictory statements, previously made, without asking him the preliminary question. *State v. McQueen*, 1 Jones, 177; *Jones v. Jones*, 80 N. C., 246; *State v. Davis*, 87 N. C., 514; *Radford v. Rice*, 2 Dev. & Bat., 39.

Our conclusion is there is no error. This opinion must be certified to the superior court of Halifax county, that the case may be proceeded with in conformity therewith and the law of the state.

No error.

Affirmed.

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STATE v. JOSEPH J. WILLIAMS.

Evidence—Criminal Practice—Witness, impeachment of—Privileged Communication—Right of counsel to see document handed to witness.

1. The practice of directing witnesses for the prosecution to be taken to the office of prisoner's counsel and there examined by them as to what their testimony will be on the trial, with a view of aiding in the preparation of the defence, is disapproved, and the power of the court to allow it, questioned.
2. The judge may perhaps allow counsel to converse with such witnesses in presence of some one representing the interest of the prosecution.
3. Where a witness for the prosecution (here an accomplice) was sent by permission of the court and solicitor, at the request of the prisoner, to the office of prisoner's counsel and was there examined by them with a view to preparing his defence, *it was held* to be competent on the trial of the prisoner to prove by one of the counsel the statements made by the witness, for the purpose of impeaching his testimony on the trial—the value of such testimony under the attending circumstances being a question for the jury.
4. The facts here do not interfere with the operation of the rule of evidence which permits proof of declarations of a witness in conflict with his testimony at the trial, bearing directly upon the question at issue, with a view of discrediting the witness.
5. Nor can the impeaching evidence be excluded on the ground that the statements of the witness are in nature of privileged communications.
6. Where counsel puts a paper in the hands of a witness and asks him whether it is in his hand-writing and then proceeds to found a question on such paper, the opposing counsel has a right to see it.

(*Edwards v. Sullivan*, 8 Ired., 302; *Hooper v. Moore*, 3 Jones, 428; *State v. Wright*, 75 N. C., 439; *State v. Patterson*, 2 Ired., 346; *State v. McQueen*, 1 Jones, 177; *Jones v. Jones*, 80 N. C., 246, cited and approved.)

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INDICTMENT for murder, tried at June Term, 1884, of WAKE Superior Court, before *Avery, J.*

Verdict of guilty; judgment; appeal by prisoner.

Attorney-General and T. M. Argo, for the State.

Messrs. D. G. Fowle, Armistead Jones, E. C. Smith, T. P. Devereux, Bledsoe and Fuller & Snow, for prisoner.

SMITH, C. J. The prisoner is charged with the murder of William J. Watkins, and upon the trial before a jury was convicted of the crime. Many exceptions were taken to the rulings of the court by his counsel, in which it is necessary, in disposing of the appeal, to notice but two, numbered respectively 1 and 14, and resting substantially upon the same basis.

The principal witness, relied on mainly by the state to prove the homicide, and alleged to have been an accomplice in committing the crime, one John Pool, upon his direct examination, testified that on the evening of the day when the said William J. Watkins was killed, he, the witness, rode in a buggy with the prisoner from Rogers' Cross Roads to where the latter lived, to Rolesville, and heard him say, "God damned if somebody won't come up missing in the morning."

On the cross-examination he was asked by one of the seven counsel employed in the defence, if he did not say, when examined by them with permission of the court on a former occasion, in the office of one of them, touching his knowledge of the homicide, and the prisoner's connection with it, that the prisoner made no threats during that ride, and added: "I am certain of it; write that down."

The witness replied that "he did tell counsel that he did not recollect the prisoner's saying anything about anybody, but that he had since recollected it."

The counsel repeated and pressed the inquiry, and was

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reading from notes taken of his statement when, upon the interposing of an objection from the state, the counsel stated their purpose to be to contradict the witness by proving what the witness did say by one of their number, who was present and heard what was said.

The judge held "that the witness was allowed to be examined by prisoner's counsel, by order of the court and with consent of the solicitor, for the purpose of finding out what the state proposed to prove, and meeting it with other evidence, but that the privilege had been considered by the court as granted always upon the tacit understanding that the witness was not to be contradicted or impeached by declarations made to opposing counsel without the presence and protection of the state counsel and of the court.

Before any objection came from the solicitor, the judge remarked to prisoner's counsel, "Is it your purpose, gentlemen, to contradict the witness by counsel? Is that proper?" To which counsel replied, "It is not objected to," and avowed their intent to contradict witness by testimony of prisoner's counsel.

The state then objected, and the objection being sustained and the inquiry directed to such end ruled out, the prisoner excepted to the ruling and also to the remarks of the judge.

It is obvious that the practice of directing witnesses, summoned for the prosecution, to be taken to the office of counsel employed in defending the prisoner and there subjected to a rigid examination as to what their testimony will be, with a view of aiding in the preparation of the defence, is liable to dangerous abuse; and the use proposed to be made of the information thus acquired, in breaking down the witness and destroying his credibility, naturally suggested the remark made by the judge who had made the order to give the prisoner full information of the proof the state would introduce, and led to the exclusion of this method of impeaching the witness.

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It is competent for the prisoner or his counsel to converse with any one supposed to have knowledge of the offence imputed and ascertain the facts so known.

A party, even when the state is such, cannot by first summoning a witness deprive the other party, or the accused, of the testimony of the witness when favorable, nor of an opportunity of ascertaining what information he may possess, before putting him on the stand, as he might do should the state decline to introduce and examine him. This information ought to be sought and obtained voluntarily and fairly from the witness, and not by what he may deem to be a constraint. It would not be unnatural, under the circumstances of this examination, for him to feel a constraint, though none in fact may have been exercised over him. It is questionable whether the judge should have made any order for the witness' removal to the office of counsel, or to have done more than give permission for counsel to see and converse with the witness; and perhaps this in presence of some one representing the interests of the state, or at least of other indifferent persons who could also, if necessary, testify to what occurred at the interview.

His Honor seems to have felt as if he was called upon to prevent the effort to break down the witness by the means of conferring with the witness, which he, in order to a fair trial, had allowed to the prisoner's counsel.

But we know of no rule by which this testimony can be withdrawn from the operation of the well settled principle in the law of evidence, which permits proof of declarations in conflict with testimony delivered at the trial, and bearing directly upon the prisoner's guilt, with the view of discrediting the witness before the jury. *Edwards v. Sullivan*, 8 Ired., 302; *Hooper v. Moore*, 3 Jones, 428; *State v. Wright*, 75 N. C., 439.

The testimony proposed to be elicited from the witness of the alleged repugnancy, or from associate counsel, if de-

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nied, was important as showing a premeditated purpose in the prisoner, and upon proof shortly afterwards of his committing the homicide, of the grade of the crime.

The circumstances, which we have mentioned, as calculated to impair the force of proof of the repugnance, will of course be before the jury and enable them to properly estimate the value of the impeaching evidence.

We have in vain searched, as counsel have done without success, for some adjudication in which the admissibility of statements, made by a witness for the state upon a permitted examination before counsel who appear for the defence, proposed to be proved by such counsel for the purpose of discrediting him, has been passed on or considered.

We see no reason for the exclusion of the declarations as partaking of the nature of a professional and protected communication subsisting for the time being, their relations being wholly adversary and so understood by each, nor upon the assumption of their being involuntary and coerced declarations, for there is no evidence of such supposed constraint; and, if there were such evidence, would not constitute sufficient reason for withholding them from the jury. Such declarations from a witness do not stand upon the same footing as confessions of one on trial for crime, superinduced by fear or hope, as we have held at this term in the case of *State v. Mills*, ante 581.

Nor is the evidence of the contradictory representations to be rejected because proceeding from the counsel to whom they were made. There is no principle of law known to us which exempts this testimony from the operation of the general rule that permits conflicting statements as to a material fact, previously made, to be extracted from the witness himself or from others who heard them.

It is urged in the argument for the state that the witness having answered affirmatively to the question and admitted the words imputed to him, the prisoner is precluded from

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pressing the inquiry further and interrogating others who were present as to their recollection of what was said. The witness, however, does not admit his having used the words embodied in the question in form or in substance, but seeks to excuse himself for not speaking of the utterance of the threat because it had escaped his memory at the time, and had since been recalled to his recollection. But the inquiry is, did you not say that *no threats were made* by the prisoner while in the buggy? "I am certain of it, write that down," an emphatic denial not met by the answer that he did not then, as he did afterwards, remember them. This is far from an affirmative response to the question.

But if the response had been full and direct, admitting the very words contained in the inquiry, it would not prevent proof from others present of their utterance; nor indeed was it necessary first to interrogate the witness about his statements, inasmuch as the evidence was material and tended directly to show the character of the homicide as affected by express malice. It is settled where the impeached testimony has a direct bearing upon the issue, in this case in support of the criminal act charged, the repugnant statement may be shown by another without first interrogating the impeached witness. The rule is clearly defined and we find it unnecessary to do more than refer to the cases in which it is declared. *State v. Patterson*, 2 Ired., 346; *State v. McQueen*, 1 Jones, 177; *Jones v. Jones*, 80 N. C., 246; *State v. Mills*, ante 581.

We refer to another point made at the trial, not with the view of passing upon the sufficiency of the exception to the ruling, to-wit: under what circumstances the opposing counsel are entitled to examine a paper offered to a witness who is under examination, for the purpose of identification for future use on the trial, should its introduction be deemed material.

The rule is thus laid down by LORD DENMAN in *Regina v. Duncomb*, 2 C. and P. 369:

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"If a paper," he remarks, "is put into a witness' hands and it leads to anything, that is, if anything comes of the question founded on it, the opposite counsel has the right to see the paper and re-examine upon it; but if the thing misses entirely and nothing comes of it, the opposite counsel has no right to look into it."

So says Mr. Justice EARLE, in *Cope v. Dock Co.*, Q. C. & K., 757: "Whenever counsel puts a document in the hands of a witness and asks him whether it is in his handwriting, and then proceeds to found any question on such document, the counsel on the opposite side has a right to see it. In my opinion the only cases in which the opposite counsel has not this right, is where counsel after handing the document to the witness goes no further."

It is not necessary to consider the various other exceptions made during the progress of the trial, nor even that by reference to the testimony of the witness Peebles, which is virtually disposed of in what has been before said.

Nor do we mean to impute misconduct to the prisoner's counsel in what transpired upon their examination of the witness Pool. There are cases, and this may be of the number, where duty to their client demands an exposure of the conflicting statements of a witness in order that the jury may put a proper estimate upon his oath on the trial; more especially does this duty become imperative when the prisoner's life may be suspended upon the evidence given.

It is our duty to enforce and maintain inviolate the rules of law, settled by its most learned and eminent ministers, and as the prisoner has been deprived of material and important evidence, whose influence on the minds of the jury in guiding them to their verdict we cannot undertake to fathom, he is in law entitled to and must be accorded another trial. There is error, and a *venire de novo* must be awarded. This will be certified.

Error.

Venire de novo.

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STATE v. JOHN WILLIAM PIERCE.

Evidence, exclusion of, what necessary to state on appeal—Preliminary examination of witness, competent to contradict.

1. Where the contents of a paper, containing the examination of a witness upon a preliminary investigation of an alleged murder, are not set out in the case on appeal, and it appears that error was assigned in excluding it, when offered as evidence to contradict the witness on the trial, as being in itself incompetent whatever might be the contents; *Held*, that the substance of the paper being made known when offered by counsel, satisfies the general rule which requires that the case must show what the rejected evidence was, so that this court may pass upon the exception.
2. Upon a trial for murder, the prisoner introduced the coroner and exhibited a paper to him which he swore contained the examination of a witness taken down by him, and also the preliminary examination reduced to writing by a justice of the peace, for the purpose of contradicting the witness; *Held*, that the exclusion of this evidence was error.
3. The English rule in reference to the use of written memoranda in refreshing memory of witnesses, touched upon, and also that requiring testimony of deceased witnesses to be reproduced in the very words, discussed by SMITH, C. J.

(*State v. Clark*, 12 Ired., 151; *Sutliff v. Lunsford*, 8 Ired., 318; *Overman v. Coble*, 13 Ired., 1; *Whitesides v. Twitty*, 8 Ired., 431; *Lee v. Patrick*, 9 Ired., 135; *State v. Jim*, 3 Jones, 348; *Wright v. Stowe*, 4 Jones, 516; *State v. Grady*, 83 N. C., 643; *State v. King*, 86 N. C., 603; *State v. Bridges*, 87 N. C., 562; *Ingram v. Watkins*, 1 Dev. & Bat., 442; *State v. Williams*, 2 Jones, 257; *Edwards v. Sullivan*, 8 Ired., 302; *Ballenger v. Barnes*, 3 Dev., 460; *Jones v. Ward*, 3 Jones, 24, cited and approved.)

INDICTMENT for murder tried at January Special Term, 1884, of IREDELL Superior Court, before *Graves, J.*
Verdict of guilty, judgment, appeal by prisoner.

STATE v. PIERCE.

Attorney-General, for the State.

Messrs. D. M. Furches, Armfield and Linney, for the prisoner.

SMITH, C. J. The prisoner is charged with the crime of murder committed upon the body of James A. Moore, and upon his trial before the jury was found guilty.

The record shows numerous exceptions to the ruling of the court made during the progress of the trial, one only of which do we find it necessary to consider.

Two witnesses, present at the time of the homicide and who give a minute account of what occurred, (the prisoner's wife and an elder sister, both daughters of the deceased) were examined and testified at great length, whose respective statements of the transaction do not agree in some essential particulars touching the grade of the offence, and the circumstances under which the fatal shot was fired, and the crushing blow upon the head, immediately following, given, and hence it became material to the prisoner to sustain the accuracy of the testimony of the wife in his behalf, and to impair the force of that delivered by the other, on behalf of the state.

The occurrence took place at the house of the deceased on the evening of the 26th day of July, 1883, in the presence of the witnesses and their invalid mother, who was lying upon a bed in the room, and of no other persons.

From the testimony of Mary Moore, the elder unmarried daughter, who details minutely the conduct of the parties and the words which passed between them leading up to the homicide, which it is needless to recapitulate for any present purpose, it appears that the deceased was very drunk, and some cursing between him and the prisoner who had also partaken of whiskey at the house, had been heard, which prompted the witness to ask if they intended to have a fuss, and both answered they did not.

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The witness stated that some trouble occurred between the prisoner and his wife, when the prisoner said that he could not make Minnie (the name of his wife) behave, to which the deceased replied, that he could, and taking hold of her flung her over on the bed on which her mother was lying, when witness said, "you will kill mother, be quiet," he desisted, replying, "I will."

The prisoner then passed up stairs, when the deceased directed witness to shut the door and window, remarking that the prisoner had gone after his satchel and should not leave that night. This was done. The prisoner came back, and standing on the 4th or 5th step from the bottom while Minnie was sitting on the stairs, the deceased about a step from them, and witness engaged in administering medicine to her mother, she heard the prisoner say, "See here, old man, you can't run over Minnie any longer," when turning, she saw the prisoner discharge a pistol at deceased, who then had Minnie by the arm.

At the moment of firing, the deceased turned in the direction of his gun, when the prisoner advancing struck him a crushing blow on the head with the pistol, with such violence as in the witness' own words "burst his head open." When the blow was struck the deceased was facing the prisoner, with his back towards the gun.

The blaze of the pistol was so near the person of the deceased as to set his shirt on fire, and putting his hand over it, he turned towards the prisoner with the exclamation, "Oh, Bill!" when he received the blow and fell on his knees with his head on the stair step. He died immediately.

The version of the matter given by the prisoner's wife was quite different and much more favorable to her husband. To support her testimony and to impair the force of that delivered by her sister, the prisoner's counsel introduced J. A. Anderson, the coroner, and exhibited to him a paper which he swore contained the examination of the

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witness Mary, committed to writing by himself, and read over to her and a mark in place of her name put to it. He further swore that he wrote down all that she said and nothing that she did not say.

The prisoner's counsel also introduced the examination of the same witness before the justice who conducted the preliminary hearing, and proved by his oath that this paper contained the testimony of the same witness reduced to writing, not read over to her, nor does he know that she authorized him to sign her name to it.

The counsel, stating that these examinations differed from the present testimony given in, in regard to the homicide and the incidents preceding and attending it, proposed to read them to the jury to contradict and impeach the credit of the witness, but was not allowed to do so, the court holding them incompetent. To this ruling the prisoner excepts.

We have felt some hesitancy in passing upon this exception, since the contents of the excluded papers are not set out and made part of the case.

The general rule undoubtedly is that an exception to the refusal to receive offered evidence will not be sustained unless the record shows what it was, so that the court could decide upon its relevancy and misleading tendency. *Overman v. Coble*, 13 Ired., 1.

The rule is equally applicable to evidence objected to and received where error is assigned in its admission. *State v. Clark*, 12 Ired., 151; *Sutliff v. Lunsford*, 8 Ired., 318; *Whitesides v. Twitty*, *Ib.*, 431.

So it has been held in *Lee v. Patrick*, 9 Ired., 135, that when the defendant proposed to show the witness, for the purpose of refreshing his memory of facts, a certain notice, and was not permitted to do so, to which ruling exception was taken, that the judgment could not be reversed for that reason, as the case did not set forth the notice so as to en-

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able the court "to see that its contents were such as were calculated to have the effect proposed."

But our doubts have been resolved by the fact that the substance of the papers were made known when offered by counsel, and they were excluded as in themselves incompetent, whatever might be their contents. The ruling is more analagous to the case of a witness produced and excluded in consequence of his personal disability to testify, and without reference to the evidence he may give. In such case the error is assigned in the exclusion, and it is not necessary to set out what he was expected to prove. *State v. Jim*, 3 Jones, 348; *Wright v. Stowe*, 4 Jones, 516.

The refusal of the court to allow the jury to hear the examinations seems to stand on very much the same basis as the rejection of a witness who is adjudged to be disqualified to testify at all in the cause, and if this be not so, the nature and use to be made of the evidence were made known to the court at the time, sufficiently to warrant us in entertaining the exception.

Had the examinations been offered as substantive evidence bearing upon the criminal charge, they would have been properly rejected, since, if offered by the state, they are only admissible under the statute, when taken according to its requirements, if at the time of the trial the witness be dead, or too ill to travel, or of unsound mind, or absent by the procurement or connivance of the accused. THE CODE, § 1157.

The same conditions, except that resting upon the defendant's own misconduct in keeping the witness away, underlie his right to offer the testimony. *State v. Grady*, 83 N. C., 643; *State v. King*, 86 N. C., 603; *State v. Bridgers*, 87 N. C., 562.

The evidence was not tendered for such object, but as declarations of the witness made under the sanction of an oath contradicting her present testimony and disparaging

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her credit. The life of the prisoner may have been suspended upon the repugnancy of the narratives of the transaction as given by the sisters, and the credibility of the witnesses was a material element involved in the conclusion to which the jury were brought in rendering the verdict.

There is a difference in the accuracy required in reproducing the testimony of a deceased witness given on a former trial, as a substitute for it, and the memory required in recalling conflicting statements made elsewhere, which is thus stated by GASTON, J., in *Ingram v. Watkins*, 1 Dev. & Bat., 442:

"The testimony of the deceased witness should be placed before the new, as the law required it to be placed before the former triers. Both are entitled not only to the truth, but to the whole truth. The copy must be ascertained to be faithful, before it is admitted as a representative of the original. * * To impeach a witness' credit, one clear and advised contradiction in this respect is sufficient, since it is the rule of law as of good sense, that he who falsifies himself in one point is undeserving of belief in all, *falsus in uno falsus in omnibus*. No more therefore of the witness' former declaration is necessary to be heard, than what is charged to be repugnant to his present statement." *Wright v. Stowe*, *supra*; *Edwards v. Sullivan*, 8 Ired., 302; as a rule of law modified in *State v. Williams*, 2 Jones, 257, and other cases.

Even, however, in the former case, it is sufficient if the witness can state the substance of all the deceased witness swore, and it is not necessary that he should repeat the very words. *Ballenger v. Barnes*, 3 Dev., 460; *Wright v. Stowe*, *supra*.

In *Jones v. Ward*, 3 Jones, 24, an attorney who had taken notes of the testimony of a deceased witness on a previous trial, but had no recollection of it independently of the

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notes, when he swore to their correctness, was allowed to introduce them in evidence.

The same ruling was made by SAVAGE, C. J., in *Clark v. Vorce*, 15 Wend., 195. Much more confidence should be reposed in the accuracy of a memorandum of the very words as they fell from the lips of the witness, than in a writing contemporaneously made of passing events.

The objection to these papers rests upon the idea that they are offered as such, and not as a means of refreshing the memory of the witnesses who testify in regard to them. They do not prove themselves, but rest upon the testimony of those officers of the law. The production of the writings is required where the witness remembers having seen the writing before, and though he has no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct. 1 Greenl. Evi., § 437.

The purpose here is not to prove any facts sworn to, but what were the declarations made by the witness—what did she then say—what was her version of the matter. What higher proof could be had than her very words written down as they were uttered with care and under a sense of official obligation.

We are aware that the rule in England is very stringent in reference to the use of written memorials in reviving a failing memory of past occurrences, and confining them to that purpose.

Referring to the doctrine that requires the testimony of a deceased witness to be reproduced in his very words, GIBSON, J., remarks in *Smith v. Lane*, 12 S. & R., 84, "To do this would require a memory which seldom falls to the lot of any one. * * * But this absurdity has been exploded by this court, and in this state it is unnecessary to profess to use the language of a deceased witness, but only to

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undertake to state the substance of all he swore in relation to the particular transaction.

In *Heeran v. Wendell*, 11 N. H., 112, the memorandum was received in connection with a witness' oath, that he heard certain matters—that he made a memorandum of those matters—that this is that paper—and that it is a true statement of what then occurred. PARKER, C. J., remarking that the memorandum then becomes part of the *testimony of the witness*, and the question is whether the paper itself may be received to show the particulars of what then occurred, the witness testifying that he now has no recollection of all the particulars, but he has no doubt the facts there stated are true, and that he should, within a short time subsequent, have sworn to them from recollection. To same effect is *State v. Rawls*, 2 N. & Mc., (S. C.) 331.

Our conclusion, therefore, is that error was committed in ruling out the examinations as impeaching evidence, which entitles the prisoner to another jury.

While it is of the highest moment to the well-being of society that the violated law should be vindicated in the punishment of crime, it is not less so to preserve inviolate those rules and methods which the law has prescribed to secure a fair trial of one accused, and which has the sanction of ages. The verdict must be set aside, and a *venire de novo* awarded, and to this end it will be certified to the superior court of Iredell.

Error.

Venire de novo.

STATE v. BULLOCK.

STATE v. MAG BULLOCK.

Assault—Wife may fight for husband—Excessive force, question for jury.

While a wife has the right to fight in the necessary defence of her husband, yet, if she use excessive force, she is guilty; whether such force was used, and whether she acted freely or under constraint of the husband, were questions properly submitted to the jury upon the evidence in this case.

(*State v. Johnson*, 75 N. C., 174; *State v. Jones*, 77 N. C., 520, cited and approved.)

INDICTMENT for assault and battery, tried at Fall Term, 1884, of ORANGE Superior Court, before *Philips, J.*

The indictment was found against Henry Bullock and his wife Mag Bullock, and the jury returned a verdict of guilty against the latter, she alone being on trial.

On the trial the state introduced the prosecutor (one Jackson), as a witness, who testified that he rented a tract of land to Henry Bullock, who with his wife lived in a house upon the same. In the upper story of the house, it was agreed, that the tobacco raised by said Henry and the prosecutor should be stored. Henry put his tobacco there, but objected to the prosecutor's being stored there. Thereupon a dispute arose between them, in the course of which the prosecutor slapped Henry in the face and seized him by the collar. While thus engaged, the witness heard the defendant (the wife) say, "shoot him, shoot him," and soon thereafter she struck the prosecutor on the head with a "bed-wrench" made of a piece of hickory wood, twenty inches long and two by four inches thick, with nails driven through the end, the heads of some of them extending beyond the wood. The prosecutor then seized the defendant who thereupon desisted.

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The husband had no weapon to shoot the prosecutor, nor did he attempt to use any weapon. There was no evidence that any injury was done to the prosecutor.

The defendant asked the court to charge the jury, that being the wife of Henry Bullock, and seeing him stricken by the prosecutor, she had the right to strike in defence of her husband and was therefore not guilty. This instruction was given, and the court added "that if she used any excessive force she is guilty, and whether she did use excessive force, was a matter for the jury to determine from the evidence;" and to this the defendant excepted.

"The court further charged the jury that, it being shown the defendant assaulted the prosecutor in the presence of her husband, it was presumed in the absence of evidence to the contrary, that she did it under his constraint, and in such case she would not be guilty; but this presumption could be rebutted by showing that in fact the defendant aided freely and without constraint, and that there was some evidence upon this point to be considered by them." Defendant excepted.

Verdict of guilty, judgment, appeal by the defendant.

Attorney-General, for the State.

Messrs. Graham & Ruffin, for defendant.

MERRIMON, J. The wife did not so manifestly fight in the defence of her husband, as to make it the duty of the court to instruct the jury that she was not guilty. The conflict between the husband and the prosecutor was not a fierce or deadly one, nor were they struggling or fighting on unequal terms. Nevertheless the wife cried out to her husband "shoot him, shoot him," meaning the prosecutor, and at once she seized a heavy instrument, with which she might have killed the prosecutor, and struck him with it.

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It does not appear that her interference was necessary at all, but making all due allowance for her wifely zeal, and her possible apprehensions as to her husband's safety, it seems to us that the court might well leave it to the jury to say whether or not she used more force than was necessary.

She had no right to fight to gratify her feelings of indignation or spiteful revenge; she could only fight in the necessary defense of her husband, and be excused. *State v. Johnson*, 75 N. C., 174. The jury might not weigh the force employed by her, as against her in this action, in "gold scales," but there was some evidence to go to and be weighed by them as to the necessity for her interference, and the excess of force used.

It does not seem to us, that, under the circumstances developed, any question was properly raised as to the constraint of the wife on the part of the husband, but in any view of the matter, the court's charge was not erroneous. Her fierce language, the character of the weapon she used, the conflict between her husband and the prosecutor, was evidence tending to rebut any presumption of constraint upon her imposed by her husband. It is true, that she desisted as soon as the prosecutor seized her, and this was a circumstance in her favor.

The case was fairly put to the jury by the court, and the responsibility was with them. *State v. Jones*, 77, N. C., 520.

There is no error, and the judgment must be affirmed. To that end let this opinion be certified according to law.

No error.

Affirmed.

STATE v. HUNTLEY.

STATE v. JOSEPH HUNTLEY.

*Assault and Battery upon defendant's wife—Jurisdiction—Deadly
Weapon—Serious Damage.*

1. Where the defendant committed an assault and battery upon his wife with great violence, such as appears by the facts found in the special verdict here, *it was held*, that the serious damage done excluded the jurisdiction of a justice of the peace to hear and determine the case.
2. The question as to what is a "deadly weapon" and what is "serious damage," under the statute giving jurisdiction to justices to try assaults, &c., discussed by MERRIMON, J.

(SMITH, C. J., dissenting.)

(*State v. Johnson*, 64 N. C., 581; *State v. Pettie*, 80 N. C., 367, cited and approved.)

INDICTMENT for assault and battery, tried at Spring Term, 1884, of HAYWOOD Superior Court, before *Graves, J.*

The defendant was indicted for an assault and battery upon his wife "with a certain deadly weapon, to-wit, a stick," and "did beat, wound and seriously injure," &c., and upon the trial the jury found a special verdict as follows:

"The jury find that Rachel Huntley, upon whom the assault and battery is alleged in the bill of indictment to have been committed, was at the time of the alleged assault and battery the wife of the defendant; that within six months after the alleged assault and battery, complaint was made by one Evans before W. H. Faucett, a justice of the peace of Haywood county, and thereupon he issued his warrant and had the defendant brought before him and tried the case, and adjudged that there was no serious injury done, or deadly weapon used, and took final jurisdiction of the case, and adjudged the defendant guilty and imposed a fine upon him; that the facts in regard to the alleged

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assault and battery we find to be, that within two years before the finding of the bill of indictment the defendant took an ordinary switch, not larger than the little finger of the usual size of a woman's hand, and with the switch whipped the said Rachel Huntley over her clothing on her back; that the whipping was continued for some time, not giving her more than twenty licks; that the whipping was of such violence as to break the skin and raise wheals upon her person, and to draw the blood, so that it came through her clothing so as to be seen on the outside of her clothing in three or four places; that the said Rachel was not so injured as to prevent her from going about and doing as usual. If upon these facts the defendant is in law guilty, we find him guilty; and if upon these facts the defendant is in law not guilty, we find him not guilty."

The court being of opinion that the facts found in the special verdict did not in law amount to serious injury, and being further of the opinion that the justice of the peace had final jurisdiction to try and determine the matter, directed a verdict of not guilty to be entered, and adjudged that the defendant go without day, from which judgment the solicitor for the state appealed.

Attorney-General, for the State.

No counsel for the defendant.

MERRIMON, J. The constitution (art. 1, § 13), provides that "No person shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men in open court. The legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal."

And art. iv, § 27, among other things provides, that, "The several justices of the peace shall have jurisdiction under such regulations as the general assembly shall prescribe *

* * of all criminal matters arising within their counties

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where the punishment cannot exceed a fine of fifty dollars, or imprisonment for thirty days."

And the statute (THE CODE, § 892,) provides that "justices of the peace shall have exclusive original jurisdiction of all assaults, assaults and batteries, and affrays, where no deadly weapon is used and no serious damage is done, and of all criminal matters arising within their counties, where the punishment prescribed by law shall not exceed a fine of fifty dollars, or imprisonment for thirty days." The other provisions of the section are not material in this connection.

The clauses of the constitution and the statute above set forth harmonize, and are intended to effectuate the purpose of giving to justices of the peace jurisdiction of "petty misdemeanors," and thus promote good order, expedite and cheapen the administration of criminal justice in such respects. Petty misdemeanors imply small, little, trifling, inconsiderable offences, the punishment whereof cannot exceed fifty dollars fine or imprisonment for thirty days. They must be of such small importance as that the punishment of the offender could not reasonably exceed that measure, because the constitution limits the jurisdiction to such offences. In the absence of any statute prescribing the measure of punishment for assaults, assaults and batteries, affrays and like small misdemeanors, and thus bringing them within the jurisdiction of a justice of the peace as prescribed by the constitution, the statute cited conferring jurisdiction could be upheld upon no other ground. *State v. Johnson*, 64 N. C., 581. It is because the offence is so small, that the punishment could not exceed that mentioned, that the jurisdiction of the justice of the peace arises.

The statute cited, in effectuating the provisions of the constitution, confers on justices of the peace exclusive original jurisdiction when "no *deadly weapon is used* and no serious damage is done." This obviously means, that if a "deadly weapon" is used, a justice of the peace shall not have juris-

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diction. This circumstance gives the offence a serious aspect and makes it important. Then what is a deadly weapon? It must be an instrument used, or that may be used, for the purpose of offence or defence capable of producing death. Some weapons are *per se* deadly; others, owing to the manner in which they are used, become deadly. A gun, a pistol, or a dirk-knife, is of itself deadly; a small pocket knife, a walking cane, a switch of the size of a woman's finger, if strong and tough, may be made a deadly weapon if the aggressor shall use such instrument with great or furious violence, and especially, if the party assailed should have comparatively less power than the assailant, or be helpless and feeble. Hence, if a weapon not in itself deadly should be made so by its use, or the manner of using it, the justice of the peace could not have jurisdiction, when it had been so used. It is the *use* of a deadly weapon, not necessarily the use of it to the extent of fatal consequences, that excludes the jurisdiction. It is the use of such instrument that gives consequence to the offence.

The statute likewise confers upon a justice of the peace jurisdiction in the classes of cases mentioned, wherein "*no serious damage is done.*" This does not imply pecuniary damage, nor does it imply merely physical damage, such as acute pain, or protracted bodily suffering, or the defacement of the person, or the impairment of physical power, or mental suffering; it means damage in one or more of these respects, but it implies as well and as certainly, damage to the peace, good order, decencies and proprieties of society. If the offence is such as to damage greatly the party assailed, or the offenders, or one or more of them, or, if it is calculated to outrage, stir up the wrath and disturb the quiet and good order of the community, if it shocks the moral sense of all good citizens, the justice of the peace would have no jurisdiction; such offence is not petty, small, trifling and of little importance in the eye of the law. The law requires

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that offenders in such cases shall answer in the higher courts, where a judge, better fitted for such duties and of larger experience, may treat the offence more seriously, and impose adequate punishment before the larger community.

In this case, it appears from the special verdict, that the defendant assaulted his wife with "an ordinary switch not larger than the little finger of the usual size of a woman's hand, and with the switch whipped the said Rachel Huntley over her clothing on her back; that the whipping was continued for some time, not giving her more than twenty licks; that the whipping was of such violence as to break the skin and raise welks upon her person and to draw the blood, so that it came through her clothing so as to be seen on the outside of her clothing in three or four places; but she was not so injured as to prevent her from going about and doing as usual.

It seems to us, that this recital of facts found by the jury, makes it manifest that "serious damage" was done to the woman; the physical suffering must have been severe for a day or two, and more or less for several days; her mental suffering and humiliation, if she was an ordinary woman, must have been great; she must have been much weaker than her husband, and he whipped her with unusual violence, with an instrument that might be deadly, as applied to the back of a woman. Such offence was not petty.

There was also damage done to the peace, decencies and proprieties of the public. Such offence was calculated to outrage in a high degree, and stir up the wrath of the people, male and female, and provoke them to violence and unlawful redress of the public grievance. Surely, if a man should thus violently whip a woman, or another man, or a boy, whom he could thus assault, it should be regarded as manifestly serious damage to the individual assailed, and like damage to the good order of society, to say nothing of its decencies and proprieties.

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We cannot doubt that there was "serious damage" in this case in the sense of the statute.

If it be granted that ordinarily the contentions, strifes and conflicts that sometimes unhappily disturb the peace of husband and wife ought not, upon grounds of policy, to be brought before the public, such a whipping as that inflicted by the defendant upon the back of his wife transcends all bounds of policy; and the offence against the public, leaving the victim out of view, is so great that the law requires that the offence shall be dealt with seriously in the higher courts where merited punishment may be imposed and a broad example made to deter others from perpetrating like offences.

If it be said that such a whipping in some possible cases would not be regarded as serious among some classes of people, the answer is, that the law knows no distinctions as to classes of people; it applies to all alike, and peace and good order must prevail everywhere and among all classes. Such offence, no matter by whom committed, in the eye of the law, is not petty but serious. It is clear that the justice of the peace had no jurisdiction to try the defendant, as it appears he undertook to do, and therefore, a verdict of guilty should have been entered. *State v. Pettie*, 80 N. C., 367.

There is error. A verdict of guilty must be entered, and further proceedings had according to law. To that end let this opinion be certified to the superior court. It is so ordered.

SMITH, C. J., (*dissenting*) I find myself unable to agree with the other members of the court in the construction they put upon those provisions of THE CODE which confer and limit the criminal jurisdiction of justices of the peace. (Sections 892 and 987).

There are four specified forms of assault, dependent upon the character of the instrument or the intent with which

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it is made, or the consequent injury to the party assailed, which, as demanding perhaps a severer punishment than he can inflict, the statute commits to the exclusive cognizance of a higher tribunal. If the assault be with intent to kill, or commit rape, which if perpetrated is a capital felony ; or with a deadly weapon, which endangers life ; or if attended with "*serious damage*," the justice cannot try the offender. The association of the other assaults with one, the grade of which is determined by its actual results, seem to me to indicate that the "*serious damage*" was intended to take in those unenumerated cases where some permanent injury is inflicted, approaching in criminal turpitude the other assaults mentioned, and not to embrace transient injury or pain.

Without extenuating the conduct of the accused in any respect, we must put an interpretation upon this enactment of universal application in its terms, which is in consonance with the manifest general purpose ascertained by its surroundings.

It is of course difficult to define the line that separates damages which are not, from those which are *serious*, so as to give the precise import of the words, but I think clearly the severity of the present assault does not bring it within the meaning of the enactment.

PER CURIAM.

Reversed.

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STATE v. HUGH A. RUSSELL.

Indictment—Assault and Battery—Character of Weapon—Jurisdiction.

1. In indictments for assault with intent to kill or commit rape, the *intent* must be averred.
2. Where an assault is charged to have been committed with a deadly weapon, the *character* of the weapon must be averred.
3. Where the indictment charges an assault by which serious damage was done, the *extent* of the injury must be averred.
4. Though the indictment charge an assault with a deadly weapon without stating the particular kind of weapon used, and it does not appear by the record or the case that the same was found within six months after the commission of the offence, the indictment will be sustained for a simple assault and battery and the superior court will hold jurisdiction and determine the matter.

(*State v. Moore*, 82 N. C., 659; *State v. Gainus*, 86 N. C., 632, distinguished; *State v. Reeves*, 85 N. C., 553; *State v. Taylor*, 83 N. C., 601; *State v. Ray*, 89 N. C., 587, cited and approved.)

INDICTMENT for assault and battery tried at Spring Term, 1884, of SAMPSON Superior Court, before *Shepherd, J.*

There were two counts in the indictment, one of which charged that the alleged assault was committed with a deadly weapon, without specifying the weapon, and the other did not aver the use of a deadly weapon but charged that serious damage had been done.

Before pleading, the defendant moved to quash the indictment on the ground that the particular kind of weapon used was not named in the bill. The motion was overruled, and the defendant excepted.

After verdict of guilty the defendant moved in arrest of judgment upon the same ground as that upon which the motion to quash had been based, and this motion was also

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overruled, and the defendant appealed from the judgment pronounced.

Attorney-General, for the State.

Mr. D. B. Nicholson, for defendant.

ASHE, J. The motion of the defendant in arrest of judgment was properly overruled, notwithstanding the first count in the bill of indictment charging the assault and battery to have been committed with a deadly weapon, is obnoxious to the objection by the defendant.

In *State v. Moore*, 82 N. C., 659, it is held that in indictments for assaults with intent to commit rape, or where a deadly weapon has been used or serious damage done, then it is necessary for the bill to contain the proper averments of the intent, the *character of the weapon* used and the extent of the injury. This would seem at first blush to be inconsistent with the decision in *State v. Gainus*, 86 N. C., 632, where it was held that in an indictment for an assault with an intent to murder, it is not necessary to state the instrument used by the assailant. But when the rulings as stated above in *Moore's case*, are classified, it will be seen that there is no inconsistency.

Three classes of cases are there mentioned: 1. Indictments for assault with intent to kill or with intent to commit rape; there the *intent* must be averred. 2. Where an assault and battery is charged to have been committed with a deadly weapon; there the *character* of the weapon must be averred. 3. Where the indictment charges the assault and battery by which serious damage was done; there the *extent* of the injury must be averred.

So it will be seen from this analysis of the ruling in that case, that it was not held that the instrument or its character must be stated in indictments for assaults and batteries with intent to kill, but only the intent.

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The decision in *Moore's case* is supported by English decisions in indictments preferred under the statute of 7 George II, ch. 21, which declared "that if any person or persons shall with any *offensive weapon or instrument* unlawfully and maliciously assault," &c. In the indictments under this statute it was held that the nature of the offensive weapon must be stated. 1 East P. C., pp. 419, 420, 421.

But however defective the first count may be, standing alone, as an indictment for an assault and battery with a deadly weapon, where it does not appear from the record or statement of the case that the indictment was found within six months from the commission of the offence, the indictment must be sustained for a simple assault and battery. *State v. Reaves*, 85 N. C., 553; *State v. Taylor*, 83 N. C., 601; *State v. Moore, supra*; *State v. Ray*, 89 N. C., 587.

There is no error in overruling the motion of the defendant. Let this be certified to the superior court of Sampson county, that further proceedings may be had according to law.

No error.

Affirmed.

 STATE v. G. M. HAWKINS.

Gambling, indictment for—Retailing.

One is indictable for a violation of the act prohibiting gambling "in any house wherein spirituous liquors are retailed," whether such retailing be with or without a license. THE CODE, §1043. (*State v. Terry*, 4 Dev. & Bat., 185, cited and approved.)

INDICTMENT for gambling tried at Spring Term, 1864, of CLEVELAND Superior Court, before *McRae, J.*

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The defendant is indicted for a violation of that clause of the statute, which prohibits gambling "in any house wherein spirituous liquors are retailed, or any part of the premises occupied * * * wherein spirituous liquors are sold as aforesaid." THE CODE § 1042.

It was in evidence that one Robert Leak played cards for money with the defendant in a house occupied by the defendant in which he retailed spirituous liquors. It was admitted that defendant had no retail liquor license, and the defendant asked the court to charge the jury, that, as he had no such license, he could not be convicted. The instruction was refused. Verdict of guilty. Judgment. Appeal by defendant.

Attorney-General, for the State.

Messrs. Hoke & Hoke, for defendant.

MERRIMON, J. We were at first inclined to think, that this clause of the statute referred to and embraced only houses and premises where spirituous liquors are retailed by virtue of a license duly granted under the law authorizing the retail of such liquors. But upon further reflection we are of opinion that it has a wider scope, and it embraces all houses and premises where spirituous liquors are retailed as a business, whether with or without a license.

To *retail* means, generally, to sell by small quantities, in broken parts, in small lots or parcels, not in bulk. There is nothing in the statute that goes to show this term is used in any restricted or limited sense, or that it does not imply any retailing, either rightful or wrongful. The evil to be remedied is just as great in the one case as the other; perhaps, it is greater where the retailing carried on is unlawful. Besides, it would not consist with the integrity and thoroughness of the law to allow those who openly violate it, to

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take advantage of their own wrong. *Nulius commodum capere potest de injuria sua propria.*

The present statute is, in all material respects, the same as that found in 1 Revised Statutes, ch. 34, § 69 ; indeed it takes the place of it. This court in construing that statute held that gambling in a house where retailing spirituous liquors was carried on without a license obtained according to law, was a violation of its provisions. Judge DANIEL, in delivering the opinion of the court, said : " We are of the opinion that the circumstance of Vannoy's not having complied with all the requisites of the law in obtaining his license to retail, is no excuse for the defendant. The jury have found the facts that he did retail spirits in his store-room. That fact satisfies the gaming act above quoted, and the charge of the indictment that spirits were retailed in the house." *State v. Terry*, 4 Dev. & Bat., 185.

Those who gamble in a house where an illicit retailing of spirituous liquors is carried on, cannot take shelter behind that business !

According to the evidence set forth in the record, the defendant kept a house wherein spirituous liquors were retailed in the sense of the statute. The jury found that himself and another repeatedly played cards for money in that house while it was used for that purpose, and although he had no license as a retailer, he was guilty of a violation of the statute.

The judgment must be affirmed, and to that end let this opinion be certified to the superior court according to law. It is so ordered.

No error.

Affirmed.

STATE v. JONES.

STATE v. ANDERSON JONES.

Evidence, discrediting witness.

On trial of an indictment for perjury, assigned in an alleged false oath taken in a bastardy proceeding, in which the defendant swore he never had sexual intercourse with the prosecutrix, the prosecutrix testified she never had such intercourse with any other man than the defendant; *Held*, that the defendant for the purpose of discrediting her testimony had the right to show by a witness that he (witness) had often been criminally intimate with her for several months preceding the birth of the child.

(*Cheek v. Watson*, 90 N. C., 302; *State v. Johnson*, 82 N. C., 589; *State v. Crouse*, 86 N. C., 617, cited and approved.)

INDICTMENT for perjury, tried at Spring Term, 1884, of DUPLIN Superior Court, before *Shepherd, J.*

The case states: It was conceded that at a trial in August, 1880, before a justice of the peace, in which this defendant was prosecuted for bastardy by one Sarah Creech, the defendant swore he had never had sexual intercourse with the said Sarah.

On this (the perjury trial) the said Sarah testified that before the trial before the said justice she had never had sexual intercourse with any other man than the defendant. She also stated, upon cross-examination, that she had sworn to the same facts before the justice of the peace, and she also testified that defendant did have sexual intercourse frequently with her during the year 1879, extending into the fall, and that the child was born on the 6th of May 1880.

In the course of the trial, the defendant offered to prove by a witness that he (the witness) had had habitual sexual intercourse with said Sarah several months before the trial of the said bastardy proceeding, and before the birth of the child. This was objected to by the state, and thereupon the

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defendant stated to the court that he offered it for the purpose of discrediting the witness Sarah, but the court sustained the objection of the state, and declined to admit the evidence, and the defendant excepted. There was a verdict of guilty, and the defendant appealed from the judgment pronounced.

Attorney-General, for the State.

Messrs. H. R. Kornegay and Strong & Smedes, for defendant.

SMITH, C. J. The perjury imputed to the defendant consists in an alleged false oath taken before a justice of the peace in August, 1880, upon a proceeding against him, charging him with the paternity of the bastard child of Sarah E. Creech, wherein he swore that he had never had any sexual intercourse with her.

Upon the trial of the issue the said Sarah testified that previous to the proceeding before the justice, she had never had any sexual intercourse with any other man than the defendant.

On cross-examination she stated that she had given similar and consistent evidence on her examination before the justice, and that the defendant did have such criminal intercourse with her frequently during the year 1879, extending into the fall, and that the child was born on May 6th, 1880.

The defendant then introduced a witness and proposed to inquire of him if he had not been often criminally intimate with the mother for several months preceding August, 1880. On objection the court refused to let the testimony go to the jury, and the exception to this ruling is the only matter for review on defendant's appeal.

The falsehood assigned in the defendant's oath lies in his denial of the existence of criminal relations between himself and the mother at any previous time, and whether she

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had formed similar relations with others, however applicable to an inquiry into the paternity of the child, not then before the court, is a question not pertinent to the issue before the jury, nor, if shown, does it tend to sustain the oath of the accused that he had none such at any time. The charge is that he had himself had such illicit intercourse with the mother and he swore falsely in denying the fact.

If the testimony of the mother as to her relations with other men came out upon her direct examination, and constitutes, as the record seems to indicate, *a part of the testimony in chief*, which, while disavowing criminal intimacy with all others, imputes such intimacy with the accused, thus associating the two statements in a single declaration, it would be but reasonable to allow the proposed contradictory evidence in disproof of the mother's general statements; and the rule seems to apply to testimony not material and open to objection if made, when no objection being made it goes before the jury. If the jury hear irrelevant testimony, it ought to be truthful and not *ex parte* and misleading. 1 Greenl. Evi., § 468; *Cheek v. Watson*, 90 N. C., 302.

If the testimony was elicited upon the examination of defendant's counsel, the answer, which involves a collateral fact affecting the credibility of the witness only, is conclusive upon well established principles of evidence. *State v. Johnson*, 82 N. C., 589; *State v. Orouse*, 86 N. C., 617, and other cases.

The case prepared on appeal contains a very unsatisfactory statement of the facts relating to the mother's evidence. A literal interpretation of the record if, as we must infer, though not so stated, the mother was produced as a witness for the state, her testimony *indirectly only* charges the defendant with the criminal intercourse, for she says that she *had never had such with any other man than the defendant*, without saying positively that she had such with him, and thus her relations with others is part of her charge against the

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defendant. On the other hand, upon her cross-examination, consistent statements are elicited in corroboration of her testimony in chief, which ought to proceed from the state, and then follows her direct imputation of criminality to the defendant. These difficulties somewhat embarrass us in arriving at a satisfactory conclusion in making a disposition of the appeal, but as we cannot look outside of the record and must take it as sent up, it does appear that the testimony to be disproved constitutes a substantial part of that delivered by the mother, and must be open to explanation and contradiction, that the jury may know its truth.

There must be a new trial, and it is so ordered. Let this be certified.

Error.

Venire de novo.

 STATE v. W. B. MARSH.

Removal of Fence—Evidence of title to land not admissible.

1. On trial of an indictment for removing a fence in violation of THE CODE, § 1062, it appeared in evidence that there was a controversy about the dividing line which separates the land of the prosecutor from that of the defendant—the former being in possession but the latter claiming the right to the land; *Held*, that evidence offered to show that the fence was on land belonging to the defendant, was properly ruled out.
 2. In such case it is only necessary for the state to show the *actual* possession of the prosecutor; and it is no defence for the defendant to locate the dividing line and show title in himself. This right must be asserted in a civil action.
- (*State v. Williams*, Busb., 197; *State v. Headrick*, 3 Jones, 275; *State v. Mace*, 65 N. C., 344; *State v. Roseman*, 66 N. C., 634; *State v. Hovts*, 76 N. C., 117; *State v. Piper*, 89 N. C., 551, cited and approved.)

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INDICTMENT for removal of fence in violation of the provisions of the statute, tried at Spring Term, 1884, of UNION Superior Court, before *MacRae, J.*

Verdict of guilty, and the defendant appealed from the judgment pronounced.

Attorney-General, and Covington & Adams, for the State.
Messrs. Payne & Vann, for defendant.

SMITH, C. J. The defendant is charged under section 1062 of THE CODE as it was in force early in the year 1883, with the unlawful and wilful removal of a fence around the cultivated field of one J. A. Richardson, and upon his trial was found guilty.

The exceptions taken by the defendant during the progress of the trial before the jury are numerous, but are all referable to the exclusion, on objection from the state, of evidence offered to show that the fence displaced and torn down, was on land belonging to the defendant, and are resolved into the one inquiry as to its competency for such purpose.

There can be no question, that, conceding the fact that the defendant did own the land on which the fence was standing, he could not have committed the offence contained in the statute, for it is not unlawful for him to remove an obstruction placed upon his own property; and so it is held in several cases where the construction of the enactment has come before the court. *State v. Williams*, Busb. 197; *State v. Headrick*, 3 Jones, 375; *State v. Mace*, 65 N. C., 344; *State v. Roseman*, 66 N. C., 634.

But surely, remarked Mr. Justice SETTLE, in *State v. Mace*, the purpose was not to prohibit the owner from doing as he likes with his own property. He may either improve or destroy it, and no question can be made by others as to the damage done to the property.

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Here, there was a controversy about the dividing line which separates the land of the prosecutor, Richardson, from the land of the defendant, from which the former was cut off, both areas constituting a single tract, as stated in the testimony of the prosecutor, who says he put the fence further over as an assertion of his own title up to the boundary claimed by him. The fence was part of that enclosing a field in possession of Richardson, on which, at the time of the removal, in February, was some ungathered cotton standing of the growth of the previous year, and wheat had been sown.

The defendant under a claim of ownership and of right to the land, made the removal and now defends by proposing to show that the title was in him and not in Richardson.

Thus he proposes to narrow the issue into one of title and require the jury to decide, in a public prosecution, to whom the disputed land belongs.

This, in our opinion, was wholly admissible, and testimony upon this point was properly excluded. It was only necessary for the state to prove the actual possession of the enclosed lands, and that it was in cultivation by the prosecutor, when the acts charged were done, and it is not a defence upon this trial for the defendant to locate the true line of division, and show title in himself to the portion of the field from which the fence was removed.

"The prosecutor," say the court in *State v. Hovis*, 76 N. C., 117, "was in the actual quiet possession of the fence around his field in cultivation, and had been for more than a year, when the defendant pulled it down. This possession could not be disturbed by any adverse claimant in this "short hand" way, because it would in most cases lead to some other and more serious breach of the peace and good order of society. If the defendant has a better title than the prosecutor to the premises or to the possession thereof,

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he can assert it by due course of law, *but he cannot do so by violating the criminal law of the state.*"

So in the recent case of *State v. Piper*, 89 N. C., 551, it was held that the lessor of two adjoining fields to different tenants, one of whom had constructed a division fence and whose wife continued to occupy and cultivate that demised to her deceased husband, in removing the fence, was amenable to a prosecution under the act.

There was no error in the ruling out the evidence offered of title in the accused upon the trial of the indictment, his remedy being in a resort to a civil action after so long an unresisted possession and use of the field by Richardson.

This will be certified to the end that judgment be rendered upon the verdict in the court below.

No error.

Affirmed.

STATE v. JOSEPH MATTHEWS.

False Pretence.

Where the defendant obtained goods of the prosecutor by falsely stating that they were needed to bury a sister-in-law's child who had just died; *Held*, that he is guilty of false pretence, and it matters not whether the owner parted with his goods for the sake of gain or for a charitable purpose.

(*State v. Dickson*, 88 N. C., 643, cited and approved.)

INDICTMENT for false pretence, tried at Fall Term, 1883, of ROCKINGHAM Superior Court, before *MacRae, J.*

The facts in the case as developed by the evidence are, that defendant went to the store of R. H. Smith in September, 1883, and asked Smith to credit him for some goods,

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and stated that the child of his sister-in-law was dead, and that the articles he wished to buy were necessary for the burial of the child. Smith refused to let the defendant have the goods at first, but he begged so earnestly that he finally sold him a piece of cotton cloth on credit. Defendant promised to pay for it, but it was the charitable object alone that induced Smith to let him have the goods, because he said his sister-in-law's child was dead, and she needed the cloth to bury it. But at the time of the transaction the defendant had no sister-in-law, and the statement as to the death of the child was false.

The defendant upon this state of facts requested the court to charge the jury that he was not guilty, but the court refused to give the charge.

There was a verdict of guilty and judgment thereon, from which the defendant appealed.

Attorney-General, for the State.

No counsel for defendant.

ASHE, J. It is well settled that to constitute the crime of false pretence under Bat. Rev., ch. 32 § 67, THE CODE, § 1025, that there must be a false pretence of a *subsisting fact*; the pretence must be knowingly false; money, goods or other thing of value must be unlawfully obtained by means of the false pretence, and with the intent to cheat and defraud the owner of the same. *State v. Dickson*, 88 N. C., 643, and cases there cited to the same effect.

Here, the defendant failing to purchase the goods upon a credit, resorted to the falsehood of stating that his sister-in-law's child was dead and the cloth was needed for its burial. The death of the child was the false pretence of a *subsisting fact*. The defendant had no sister-in-law, and no child of a sister-in-law was dead. He knew the statement was false, and could have been made with no other purpose

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than to cheat and defraud Smith of his goods And the goods were obtained by means of the false pretence. These facts bring the case fully up to the requirements of the statute.

It can make no sort of difference what motive prompted Smith to part with his goods, whether for the sake of gain or from feelings of charity.

It is certainly a very lame defence, set up by the defendant, that he is not guilty because the goods of the owner were parted with under the promptings of a charitable motive, when he himself, by his false statements, has excited the benevolent feelings through the influence of which he obtained the goods. If he had not made the false statement as to the death of the child, the owner of the goods would not have had his charitable sympathy aroused, and but for those feelings he would not have parted with his goods. The goods consequently were obtained by means of the false pretence.

There is no error. This must be certified to the superior court of Rockingham county, that the case may be proceeded with according to law.

No error.

Affirmed.

STATE v. DUPLIN CANAL COMPANY.

Obstructing Navigable Streams—Sluicing—Motive Power.

1. On trial of an indictment against the Duplin canal company for violation of section 1123 of THE CODE, in placing obstructions in a stream whereby its navigation was prevented; *Held*, that defendant cannot justify under its charter, which expressly prohibits

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the company from impairing the navigability of streams. Act 1871-'72, ch. 151, § 7, proviso.

2. *Held further*, that the use of the water for "sluicing" the canal-bed is not using it as a "motive power."

INDICTMENT for obstructing a water-course tried at Spring Term, 1884, of PENDER Superior Court, before *Shepherd, J.*
Verdict of guilty; judgment; appeal by defendant.

Attorney-General, for the State.

Messrs. R. H. McKoy and J. D. Bellamy, for defendant.

SMITH, C. J. The defendants, the Duplin Canal Company, organized under a law of the state, and W. L. Young, its agent, are charged with felling trees and placing other obstructions in Shelter creek, so as to interfere with the use of the stream for floating rafts of timber and the passage of flat boats for which it is navigable, in violation of the act of February 28th, 1883, contained in THE CODE, § 1123.

Upon the trial these defendants were convicted of the offence, and no judgment being prayed against the latter, the corporation was fined the sum of fifty dollars, and thereupon it appeals.

The defendant company claimed a right under the terms of its charter to make the obstruction in the prosecution of its object under section 5, chapter 55, of the acts of 1873-'74, and the transferred privileges contained in chapter 151, section 7, of the act of 1871-'72, the original charter granted to the New River Canal Company. The court ruled the defence unavailable in excuse of the obstructions forbidden by the statute.

It was shown by the state that Shelter creek was a natural water course, navigable for flat boats and rafts; that the obstructions were a complete barrier to their passage and impeded the flow of water; that there were no flow-ways or

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locks admitting a passage through the obstructions, and that they were formed by the defendant Young, acting under the directions of the company.

The provisions of the charter do not in our opinion warrant the total interruption of the use of this water-course. While they confer large powers upon the company in prosecuting its enterprise of uniting the waters of the rivers mentioned, or in carrying out the project contemplated in the amending enactment, it is expressly declared in section 7, of the act of 1872, as a proviso to the delegation of power to the company, "That no use of said creeks, water-courses, or bodies of water shall impair or prevent navigability of the same, and that the said company may construct upon and along said canal as many locks as they may deem serviceable for the use of said canal."

It is obvious that a total obstruction without a pass-way for water-craft, such as could use the stream, being constructed through it, was not contemplated. The statute upon which the indictment is based declares: "If any person shall wilfully fell any tree or wilfully put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, and whereby the navigation of such stream by any raft or flat may be impeded, delayed or prevented, the person so offending shall be guilty of a misdemeanor and fined not to exceed fifty dollars or imprisoned not to exceed thirty days." THE CODE, §1123.

The defendants further insist that the water interrupted by the obstruction was used as "a motive power" in "sluicing," a term used to signify the digging out or washing out of the canal bed by the flowing stream.

The proposition is not tenable. The statute is general, and the exception has obvious reference to the use of the energies of water dammed, as a moving force, and not to the

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operations of a current in motion. The prohibition is against felling any tree, or putting any obstruction, even when not extending across the stream, and the exception is that it may be done in utilizing the force of the water, but it does not confer the power to divert the water into a new channel in order that it may excavate and deepen the channel.

Upon a full examination of the statutes and the acts proved to have been done, we concur in the ruling of the court that the statute has been violated. There is no error. This will be certified to the superior court of Pender.

No error.

Affirmed.

 STATE v. JOHN H. CREDLE.

Injury to live stock, sufficiency of indictment—Notice, proof of contents—Criminal Act, intent—Widow's year's support.

1. An indictment under THE CODE, § 1068, for injury to live-stock, in which the animal alleged to have been injured is described as a "certain cattle beast," is sufficiently definite.
2. On trial of such indictment, the contents of a notice posted by prosecutor forbidding all persons trading for or buying his cattle, may be proved by parol, without showing the loss or destruction of the paper.
3. The fact that a criminal offence was committed openly and without secrecy goes to the jury to be considered by them upon the question of the existence of a felonious intent. It does not necessarily disprove it.
4. The charge of the court in this case, approved.
(*State v. Stanton*, 1 Ired., 424; *State v. Brown*, 1 Dev., 137; *State v. Clark*, 8 Ired., 226; *State v. Turner*, 66 N. C., 618; *State v. Godet*, 7 Ired., 210; *Satterfield v. Smith*, 11 Ired., 60; *Pollock v. Wilcox*, 68 N. C., 46; *Wilson v. Derr*, 69 N. C., 137; *State v. Capps*, 71 N. C., 93, cited and approved.)

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INDICTMENT for injury to live stock tried at Spring Term, 1884, of BEAUFORT Superior Court, before, *Gudger, J.*

The indictment preferred in the inferior court is substantially as follows: The jurors, &c., present, that the defendant with force and arms "did unlawfully and wilfully pursue and kill a certain cattle beast, the property of Nancy Ribbitts, with the intent then and there unlawfully and feloniously to convert the same to his use," contrary, &c. The jury found the defendant guilty, and from the judgment pronounced he appealed to the superior court.

In the statement of the case made by the chairman of the inferior court (E. S. Simmons), it appears that the prosecutrix was the widow of Henry Ribbitts who was the owner of a lot of cattle, and that she claimed title thereto under an assignment of her year's support, which shows, among other things allotted to her, a "lot of cattle running at large in Bath township;" and she testified that defendant never set up any claim to the cattle until after her husband's death; that defendant sent her ten dollars by one Keech who told her that defendant had bought the cattle, and that this sum was the balance due on that account.

One Muse, a witness for the state, testified that on the day he heard of Ribbitt's death, the defendant said he was going to "gobble up Ribbitt's cattle," and upon being asked "how," the defendant replied, "I have been talking to Sam Warren and he says he can write a bill of sale, and has promised to write it as soon as he can find out the day that Ribbitts was at Asa Wilkinson's, and am to give one third of the cattle to Warren who was to witness it." It was in evidence that Ribbitts was at Wilkinson's about three weeks before his death.

The witness further testified that defendant told him to say he (defendant) had bought the cattle from Ribbitts and paid fifteen dollars and owed ten dollars more, and that defendant afterwards told witness that he himself had written

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the bill of sale, and had Ribbitts' red bull penned in Edmund Moore's yard, and that he got Keech and Lanier to go there and kill him; that these cattle were in Bath township and the witness never heard of Ribbitt's having any other cattle.

The witness also testified that he told defendant he had heard that Ribbitts had posted notices forbidding all persons from interfering with his stock. And another witness (Campbell) testified that he saw a notice posted with Ribbitts' name signed to it, though he did not see him post it. Defendant objected to his stating its contents. Objection overruled. The witness then stated that the "contents of the notice forbid all persons trading for or buying his cattle."

The witnesses for defendant testified that shortly before Ribbitts' death, the defendant paid him fifteen dollars for the cattle, and that Ribbitts said to defendant, "you owe me ten dollars, and when you pay that, all the cattle are yours;" that the ten dollars was carried to the widow, as testified to above, and that she refused to receive it.

The testimony of the defendant himself was to the effect that he had bought the cattle of Ribbitts, and that he had killed some of them before the death of Ribbitts, without objection from him; that some one told the defendant while at his house, that the red bull was penned by Moore's boys, in Moore's yard, and defendant sent Keech there in the day time to kill him. The defendant denied making the statement to the witness Muse, in reference to the bill of sale, but said he had a right to the cattle and could prove it, and that Ribbitts told him he had posted notices warning persons not to interfere with his stock.

The defendant asked the court to charge the jury that there was no evidence that defendant pursued and killed the cattle beast; that if he sent Keech to kill the bull in Moore's pen, the defendant is not guilty under this indict-

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ment; that it must appear that defendant participated in the killing with a felonious intent, and unless he did so, he cannot be convicted of aiding, counselling or commanding; that there is no evidence the title to the cattle has been legally conveyed to the prosecutrix. These instructions were refused.

The defendant also asked the court to charge that an open public commission of an act, without any attempt at secrecy, disproves any felonious intent. Refused.

The defendant also asked the following: That if defendant believed he had a right to the cattle beast, and had it killed under that belief, whether he actually had the title or not, he is not guilty. This instruction was given.

Upon the trial of the case in the superior court, and in addition to the errors alleged in the above statement, the defendant insisted that the indictment was defective, in that it used the word "cattle beast" and failed to state the kind of cattle beast, and that therefore the court could not proceed to judgment. The motion in arrest was overruled and the judgement of the inferior court was affirmed. From this ruling the defendant appealed to this court.

Attorney-General, for the State.

No counsel for defendant.

MERRIMON, J. THE CODE, § 1068 provides that, "if any person shall pursue, kill or wound any horse, mule, ass, jenny, *cattle*, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a misdemeanor, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come to the actual possession of the person so offending. And all persons commanding, counselling, advising, aiding and abetting any of such unlawful acts shall be punished in like man-

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ner, and may be prosecuted alone, or with the principal actor."

The indictment in this action is founded upon the above recited statute, and it charged that the defendant "did unlawfully and wilfully pursue and kill a certain *cattle-beast*, the property of Nancy Ribbitts, with the intent then and there unlawfully and feloniously to convert the same to his use," &c.

Upon the trial, the jury rendered a verdict of guilty, and thereupon the defendant moved in arrest of judgment, assigning as ground for his motion, that the indictment did not sufficiently charge any offence under the statute, and that the charge was too vague and uncertain to warrant a conviction. The court overruled the motion, and gave judgment for the state.

Generally, in indictments, it is sufficient and proper to charge statutory offences in the words of the statute creating and defining them, as nearly as practicable. To this rule, however, there are some exceptions. Where, for example, the statute employs a general term, very broad in its comprehension, to designate and describe the objects to be protected by it, it is necessary in such case to specify the particular species or class in respect to which the offence is charged. As where a statute made it indictable to kill or steal "cattle" generally, an indictment charging one with killing "cattle" would not be sufficient; it ought to be set forth and specify the kind of cattle, as a horse, a mule or cow. *State v. Stanton*, 1 Ired., 424; Ros. Cr. Ev., 374, 375; Arch. Cr. Pl., 326. This is necessary in order to give the party charged such information as will enable him to learn what offence he is charged with, to prepare his defence, and to establish such record of the matter as will enable him to defend himself successfully against any subsequent prosecution for the same criminal act.

The offence should be charged in the indictment with

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reasonable certainty as to its nature, and the material constituent facts should be specified with like precision. What is such reasonable certainty and precision depends very much upon the nature of the offence. Some classes of offences are much more definite in their nature, and are capable of being specified with more precision than others. Perhaps there is no case in which it is not necessary to resort to facts and circumstances, outside of the indictment and the record, to ascertain and indentify the offence charged. Hence, the rule is that the offence should be charged with reasonable (not absolute) certainty in all material respects.

It has been held in this state, that it is sufficiently certain to charge in the indictment the larceny of a "parcel of oats" of the goods and chattles, &c., *State v. Brown*, 1 Dev. 137; a "bull tongue," meaning a species of plow-share, *State v. Clark*, 8 Ired., 226; "one turkey," *State v. Turner*, 66 N. C., 618; "a hog," *State v. Godet*, 7 Ired., 210.

If the statute under consideration had employed only the word "cattle" in describing the various species of animals to be protected, then the motion in arrest of judgment ought to have been sustained. In such case the indictment ought to specify at least the species of the animal killed or injured, as a horse, an ox, a sheep, a goat. The term "cattle" is sometimes used in statutes in a sense broad enough to embrace all such animals. But it is not used in so comprehensive a sense in the statute before us: it enumerates by name the classes of quadruped animals usually kept on the farm, and the term "cattle" is used, in a restricted but well understood sense, to designate only that class of animals belonging to the bovine species, as the ox, the cow, the bull, the heifer. So that, when reference is made to the statute, and cattle are mentioned, it is at once and certainly known what species of animals is referred to. And so, where in an indictment the defendant is charged with killing a "cattle beast" under the statute in question, he

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knows at once what class of animals the beast belongs to, as certain as if the charge specified a cow, or an ox, or a bull. Such a designation of the animal alleged to be killed or injured, affords the party indicted reasonable information to enable him to learn the kind of animal he is alleged to have killed or injured, to prepare to defend himself against the charge, and to make good his defence in case he should be a second time indicted for the same criminal act.

The charge of killing "cattle" is greatly narrowed in its compass under this statute. "Cattle" does not embrace all species of farm animals: it embraces only one species well known, to-wit, the bovine species, for other species of cattle is specially enumerated in it.

It is true the pleader might have made the charge more definite by specifying that the animal alleged to have been killed was an ox, or a cow, or a "red bull," but the law does not require the charge to be made as definite and precise as possible, but to be made with reasonable certainty.

While we think the pleader should ordinarily make the charge as specific as possible, we think that in this and in like cases the charge is sufficiently definite. The language of the statute is substantially adopted. The description "cattle beast" is, it seems, employed to designate the singular number of the plural noun "cattle." The defendant saw or could see, at once, that he was charged with killing a cow, an ox, a bull or heifer of the prosecutrix. This, in our judgment, was notice sufficient to enable him to prepare his defence, and, if he should be indicted a second time for the same criminal act, to make good his defence under a proper plea. He could show that he had before been convicted or acquitted of the charge of killing a "cattle beast" of the prosecutrix. *People v. Littlefield*, 5 Cal., 355.

A witness for the prosecution was allowed to testify that he saw a "notice" posted by Ribbitts with his name signed to it. He did not see him post it, but "the contents of the

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notice forbade all persons trading for or buying his cattle." The defendant objected to his stating the *contents of the notice*. The court overruled the objection and the defendant excepted.

It seems that the objection was not to the relevancy and competency of the "notice" as evidence, but to speaking of its contents in its absence. Why this objection was made does not appear in the record, but viewing the objection in the most favorable light for the defendant, we take it that the "notice" was not produced, and the objection was to speaking of its contents in its absence; to proving its contents by parol evidence without showing its destruction or loss.

In general, where an agreement is reduced to writing and is intended by the parties signing it to contain and to be evidence of such consent or agreement, or whenever there exists a written document, which by the policy of the law is considered to contain the evidence of certain facts, such instrument is regarded and treated as the best evidence of the agreement or facts it records; and unless it be in the possession of the opposite party, and notice be given to him to produce it, or unless it be proved to be lost or destroyed, secondary evidence of its contents is not admissible. But there are many exceptions to this general rule.

Thus, where a memorandum of agreement was drawn up and read over to the defendant, which he assented to but did not sign, it was held that the terms mentioned in it might be proved by parol. *Doe v. Cartwright*, 3 B. & A. 326, (5 Eng. C. L., 306).

So, where a verbal contract was made for the sale of goods, and it was afterwards put in writing by the vendor's agent, it was held that such contract might be proved by parol.

So also, facts may be proved by parol, though a narrative of them may be reduced to writing. In an action for trover,

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to prove the demand the witness stated that he had verbally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect. LORD ELLENBOROUGH held in *Smith v. Young* 1 Camp., 439, that it was unnecessary to produce the written notice.

Where, on an indictment for an unlawful assembly, the question was, what were the inscriptions and devices on certain banners carried at a public meeting, it was held that parol evidence of the inscriptions was admissible without producing the banners themselves. *Hunt's case*, 3 B. & A., 566, (5 Eng. C. L., 327); *Roscoe Cr. Ev.*, 3 (4th Am. Ed.). To the like effect are *Satterfield v. Smith*, 11 Ired., 60; *Pollock v. Wilcox*, 68 N. C., 46; *Wilson v. Derr*, 69 N. C., 137; *State v. Capps*, 71 N. C., 93. The exception cannot be sustained.

The "notice," whether written or printed was collateral to the issue; the defendant was not a party to it; it contained no agreement between himself and any other person; it did not purport to be evidence of a contract between parties; it did not recite facts agreed upon by parties; it was not intended to be preserved, but to serve a temporary purpose and disappear; it was not to be lodged with any person for safe keeping; it was a loose, casual paper, and what it contained might be proved like any other fact or event. The rule that a written instrument cannot be contradicted, modified or added to by parol proof, has no application to it. It was competent to speak of it and what it contained, without producing it or showing that it was destroyed or lost.

This exception does not present any question as to the competency of the evidence, if the notice had been produced, and we are not at liberty to decide any question not presented by the record.

The defendant was not entitled to the special instructions prayed for and denied by the court.

Much of the evidence tended to prove that the defendant

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commanded, counselled and encouraged the killing of the bull mentioned, and to support the charge in the indictment. On the contrary, the defendant contended there was evidence tending to show that the bull was his, and he had given instructions to kill him, in good faith, claiming him as his own property. It was fairly left to the jury to say by their verdict whether or not the defendant did so act in good faith. The court charged the jury that if the defendant believed he had a right to the animal, and had it killed under that belief, whether he actually had it or not, he is not guilty. This charge was favorable to the defendant. There was evidence to be considered and weighed by the jury, going to show that he commanded and counselled the killing of the bull as charged; and the fact that he was at his home and not present at the time the bull was killed, made no difference; he was a principal in the offence, if guilty at all, and he might, by the common law as well as by the statute, be indicted with the principal actor, or alone.

The fact that the bull was killed "openly and without secrecy" in Moore's yard under instructions from the defendant, is no justification or excuse for the killing, if the motive were such as that charged in the indictment. The language of the statute is plain, strong and without qualification. It provides that "if any person shall pursue, kill or wound," &c., whether secretly or openly, with the felonious intent specified, he shall be guilty of the offence created and defined by the statute. The fact that the act was done "openly and without secrecy" may be evidence tending to show the absence of a felonious intent, but this does not necessarily disprove it. It is evidence to be weighed by the jury.

There was evidence going to show that the bull was assigned to the prosecutrix as part of her year's support, and if the bull was of the cattle running at large in Bath township, as described in the assignment of the year's support of

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the prosecutrix as widow of her late husband (and there was evidence tending to show this), this was sufficient. The cattle, although running at large, were constructively if not actually in the possession of the intestate at the time of his death, and were of his estate at the time the year's support of the widow was assigned to her, and the title passed to her by virtue of such assignment.

We think that the defendant has no just ground of complaint that the court failed to give him the benefit of the special instructions prayed for. There was evidence tending to support the charge in the indictment. There was likewise evidence tending to support the defence. The result turned mainly upon the facts, and they were fairly submitted to the jury upon the plea of not guilty. With their verdict we have no jurisdiction or power to interfere, as the case comes before us. The judgment must be affirmed. Let this opinion be certified to the superior court of Beaufort county, to the end that it may proceed further in the action according to law.

No error.

Affirmed.

STATE v. MARK PARKER.

Indictment at Common Law.

Where a statute makes the commission of an act "unlawful" and specifies no mode of proceeding, the violation of its provisions is a misdemeanor punishable by indictment at common law.

INDICTMENT for retailing liquor, tried at Spring Term, 1884, of CLEVELAND Superior Court, before *MacRae, J.*

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The defendant was indicted for selling liquor within two and a half miles of Zion church in Cleveland county.

The indictment was preferred under the act of 1883, ch. 166, § 7, which is as follows: "That it shall be unlawful for any person to sell, or in any manner, directly or indirectly, receive compensation for any spirituous or other intoxicating liquors in the localities hereinafter named * * * within two and a half miles of Zion Baptist church, in Cleveland county." There are like inhibitions in sections four, five, and six of the act. And in section eight it is provided "that any person violating the provisions of section four, five and six of this act, shall be deemed guilty of a misdemeanor."

The defendant contended that, inasmuch as the seventh section was omitted in the enumeration of the sections of the act, the violation of which was made indictable by the eighth section, the violation of that section was not the subject of a criminal prosecution, and that therefore the defendant ought to be acquitted.

His Honor did not concur in this view, but held that "as the law made it unlawful to sell liquor as aforesaid, it was a misdemeanor to violate the same, though not so expressly declared, and charged the jury accordingly.

The defendant was convicted and appealed from the judgment pronounced.

Attorney General, for the State.

Messrs. Gidney & Webb, for defendant.

ASHE, J. There is no error in the charge given by His Honor. No doubt the seventh section was omitted to be mentioned in the eighth section through inadvertence; or, it may be, that it was a mistake in the printer. But be that as it may, it can make no difference, for there can be no doubt, as His Honor held, that the defendant is indictable at common law.

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If a statute prohibit a matter of public grievance, or command a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute, being misdemeanors at common law, are punishable by indictment, if the statute specify no other mode of proceeding. Arch. Cr. Law 2; 2 Hawk., ch. 25, § 4. There is no other mode of proceeding specified in the act; *ergo*, the defendant is indictable at common law. Let this be certified, &c.

No error.

Affirmed.

 STATE v. T. POLK.

Trial—Practice where demurrer is overruled—Appeal.

1. Upon overruling a demurrer to an indictment, the court should require the defendant to plead, and then proceed with the trial to verdict and judgment.
2. An appeal does not lie from an interlocutory judgment in a criminal action.

(*State v. Bailey*, 65 N. C., 426; *State v. Pollard*, 83 N. C., 597; *State v. McDowell*, 84 N. C., 798, cited and approved.)

INDICTMENT for an assault tried at Spring Term, 1884, of WARREN Superior Court, before *Avery, J.*

The defendant was indicted in the inferior court of Warren county for a simple assault and battery, committed within one mile of the court house in Warrenton, where and while that court was sitting. He *demurred* to the indictment, alleging as grounds of demurrer that the court had no jurisdiction of the offence charged.

The court overruled the demurrer, but gave no other judgment, and the defendant appealed to the superior court.

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The latter court affirmed the judgment of the inferior court, and the defendant appealed to this court.

Attorney-General, for the State.

No counsel for the defendant.

MERRIMON, J. The appeal from the judgment of the inferior court was improperly taken. An appeal in a case like this lies only from a final judgment. The judgment of that court overruling the demurrer was simply interlocutory, and did not in any way determine the action. The court ought to have required the defendant to plead to the indictment and proceed with the trial to verdict and judgment. If the verdict of the jury had been adverse to the defendant, he might then have moved in arrest of judgment, and thus have raised every objection to the indictment, including that to the jurisdiction, that the demurrer could enable him to make.

If his motion in arrest of judgment had been denied and judgment given against him, then he might have appealed to the superior court, taking up all questions of law raised by his exceptions and the record, and if the judgment of the latter court upon such appeal, had been adverse to him, then he might properly have appealed to this court. *State v. Bailey*, 65 N. C., 426; *State v. Pollard*, 83 N. C., 507; *State v. McDowell*, 84 N. C., 798.

The superior court ought, for the reasons above stated, to have dismissed the appeal, and the inferior court ought then to have required the defendant to plead to the indictment as we have indicated in this opinion. That is the course yet to be taken.

This appeal was improperly taken, and must be dismissed.

Appeal dismissed.

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STATE v. LEMUEL JONES.

Trial—Discretionary Power—Polling Jury.

1. The defendant on the day after a verdict of guilty moved for a new trial upon the ground that his attorney was not present in court at the time of rendition of the verdict, so as to demand that the jury be polled, and the motion was refused; *Held*, no error; whether a new trial should be granted in such case is matter of discretion in the presiding judge.
2. It is not essential to the validity of a verdict that the jury be polled.

(*State v. Paylor*, 89 N. C., 539, cited and approved.)

INDICTMENT for larceny tried at Fall Term, 1884, of GREENE Superior Court, before *Avery, J.*

There was no exception to the ruling of the judge upon the trial, and none to his charge to the jury. The jury returned a verdict of guilty, the defendant being present, but he did not suggest that his counsel was then absent, or ask that he be sent for; and on the day after the verdict was so returned the defendant moved for a new trial upon the grounds set forth in an affidavit to the effect, in substance, as follows: That the attorney employed to conduct his defence was necessarily absent from the court for about fifteen minutes while the jury were considering of their verdict, and on his return, as the affiant was informed and believed, the said attorney was surprised to find that the jury had returned into court and rendered a verdict of guilty; that it was the right of the defendant to have the jury polled, and if his attorney had been present he would have demanded the polling of the jury. And thereupon the defendant moved the court to set aside the verdict and grant a new trial.

His Honor held the facts set forth in the affidavit presented a matter only of discretion in the court, and not of

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right to defendant. The motion was overruled, and the defendant appealed from the judgment pronounced.

Attorney-General, for the State.

No counsel for defendant.

MERRIMON, J. The defendant was present in court at the time the jury rendered their verdict. He did not suggest to the court that his counsel was then absent, nor did he ask that he be sent for.

It was not essential to the validity of the verdict that the jury be polled. It was perfectly competent for the court to receive and enter the verdict in the absence of counsel, the defendant being present. A verdict thus rendered was neither void nor irregular. It was in all respects regular, and hence, it lay entirely in the discretion of the court to determine whether or not for such cause, it would set the verdict aside and direct a new trial. The presence of counsel is not essential to the validity of proceedings in criminal actions. In some classes of cases the presence of the prisoner is essential. *State v. Paylor*, 89 N. C., 539.

Ordinarily the court will see that one charged with a criminal offence is present in court when any material action is taken affecting the party so accused. And when, in a case like this, the counsel should be absent at the time the jury rendered their verdict, and it appeared that the defendant had suffered serious prejudice, the court should in the exercise of a just discretion, set aside the verdict and grant a new trial. But it is discretionary with the court whether it will or not. In this case it does not appear that the defendant suffered the slightest prejudice, and we are very sure that if the just judge who presided at the trial, had thought he did, he would at once have set the verdict aside.

There is no error. Let this opinion be certified to the superior court according to law.

No error.

Affirmed.

STATE v. HARRIS.

STATE v. FRANK HARRIS.*Indictment Criminal Practice.*

Where a bill of indictment is ignored, a new bill charging the defendant with the same offence may be sent to the same grand jury, with the names of other witnesses endorsed thereon.

(*State v. Branch*, 68 N. C., 186; *State v. Brown*, 81 N. C., 568, cited and approved.)

INDICTMENT for carrying concealed weapon, tried at Fall Term, 1884, of ORANGE Superior Court, before *Philips, J.*

A bill of indictment against the defendant was sent to the grand jury at the fall term, 1884, of Orange superior court, which was "ignored." At the same term, a second or new bill was sent against the same party for the same offence before the same grand jury, and a witness other than that sent upon the first bill was sworn and sent. The second bill was returned into court "a true bill." Thereupon the defendant's counsel moved to quash the second bill, the court sustained the motion and the state appealed.

Attorney-General, for the State.

Messrs. Graham & Ruffin, for the defendant.

MERRIMON, J. We are unable to conceive of any adequate reason why, where the grand jury ignores a bill, a new one may not be sent for the same offence and before the same grand jury, whether reference be had to the rights of the party accused, or the orderly course of judicial procedure. The bill ignored may not be returned to the grand jury because the presentment embodied in it has passed into the record, and the bill itself has gone upon the files of the court. But another bill may be sent at once, if need be,

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and the same and additional evidence laid before the grand jury to support it.

There might be a variety of reasons why a new or fresh bill should be sent, as that the jury might have failed upon the first bill to examine the witness properly, and elicit all the facts; or, they might have misapprehended the character of the evidence which they could understand and appreciate after some explanation of it by the court in a proper case; or, new evidence might be produced; and indeed, it is easy to conceive of a case in which it might be of great moment to society and a due administration of public justice that a new bill should be promptly sent.

It may be said that if a second bill can be sent in such a case, so may a third and fourth under like circumstances; and thus the accused might be greatly harrassed and oppressed. It is not to be presumed that the prosecuting officer would needlessly multiply bills for the same offence, much less that he would so prostitute his office to gratify his own malice or that of others. He would be amenable for such an offence, and besides the grand jury might refuse to act upon bills thus sent, and complain to the court; and upon proper application the court would promptly interpose a wholesome check.

It is true that, ordinarily, where a party is recognized to appear at the court and answer a criminal charge, or where he is detained in prison to await the action of the grand jury upon a criminal charge against him, he is entitled to be discharged as soon as the bill is ignored and returned into court; but it is likewise true, that upon satisfactory evidence laid before the judge, he may refuse to discharge the accused, or, require him to give new bail; or a committing magistrate, upon like evidence, may at once issue a warrant for his re-arrest. This is frequently done. And in many cases, bills against parties are sent to the grand jury before they have been arrested and while they are at large.

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So that, no right of the accused is necessarily invaded or abridged by sending a second bill in the case mentioned.

It has been common practice in this state to send a second bill for the same offence at the same term of the court where the first had been ignored, if need be. We have not known such practice condemned, nor are we aware that it has in any case led to needless vexation or apprehension of the accused.

In *State v. Branch*, 68 N. C., 186, Chief Justice PEARSON, said: "But we can see no objection to the practice, that after an indictment has been returned, 'not a true bill,' the state solicitor, upon a suggestion to the court that he has procured further evidence, may be allowed to send another bill to the same grand jury, charging the same offence." In *State v. Brown*, 81 N. C., 568, this court held that a bill returned "not a true bill," could not be *reconsidered* by the same grand jury, but Mr. Justice ASHE said, that "in every such case a new bill should be sent." In that case he makes reference to what Mr. Justice BLACKSTONE said on the same subject, but he did not find it necessary to adopt his view, or definitely construe his language. BLACKSTONE says, that where the grand jury ignores a bill,—endorsed "not a true bill," or "not found"—then the party (the accused) "is discharged without further answer. But a fresh bill may afterwards be preferred to a *subsequent* grand jury. 4 Bl. Com., 305. He does not say that a fresh bill may not be sent to the same grand jury, nor does he assign any reason why this may not be done. Other English authorities say that a fresh bill may be sent to a subsequent grand jury. There are, however, like high English authorities which say that a fresh bill may be sent to the *same* grand jury. Mr. CHITTY, in his *Work on Criminal law*, (vol. 1, p. 325) says: "If the bill be not found, or if the indictment is defective, a new and more regular one may be framed, and

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sent to the *same*, or another grand jury for their finding." Bac. Abr. Indictment, "D."

So it seems that the practice in England is not clearly or certainly settled, but the preponderance of authority there, is against sending a fresh bill to the same grand jury for the same offence where the first had been ignored. No satisfactory reason is assigned for this that we have seen. It is said to be founded in convenience, and this is probably the correct reason. *Regina v. Humphrey*, 1 Car. & Mar., 601.

It seems, however, that this practice has not obtained recognition in this country. *Knott v. Sargent*, 125 Mass., 95; Thom. & Mer. on Juries, § 661, and the cases there cited. As we have said, we can see no reason resting in principle, or founded in convenience, that forbids the view we have here expressed, and recognized in former decisions of this court.

There is error. The judgment quashing the indictment must be reversed, and the action proceeded with according to law. To this end, let this be certified to the superior court of Orange county.

Error.

Reversed.

STATE v. EPHRAIM QUEEN.

Criminal Law—Judgment—Habeas Corpus.

1. A defendant, charged with the crime of burglary with intent to commit murder, consented to a mistrial and pleaded "guilty of larceny;" and he was thereupon sentenced to imprisonment in the penitentiary; *Held*, that his confession of being guilty of a crime not charged in the indictment, warranted no judgment against him.

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2. *Held further* : As the original bill of indictment is still pending against him, he is not entitled to be discharged, but a writ of *habeas corpus* will issue, in order that he may be taken from the penitentiary and held to answer the charge in the court below.

(*State v. Lawrence*, 81 N. C., 522; *Ex Parte Summers*, 5 Ired., 149, cited and approved.)

PETITION for *certiorari* heard at October Term, 1884, of THE SUPREME COURT.

Attorney-General, for the State.

Mr. J. C. L. Harris, for defendant.

ASHE, J. The indictment charges the crime of burglary with intent to kill and murder, and is in proper form.

The defendant pleaded "not guilty" and the case was submitted to a jury, and while the case was in charge of the jury, the prisoner being at the bar of the court, by his consent and that of the solicitor for the state, it was ordered that a juror be withdrawn and a mistrial had, which was done and the jury discharged from its further consideration.

The defendant then came into court and pleaded "guilty of larceny." Thereupon it was ordered by the court "that the defendant be imprisoned in the state prison at Raleigh for the term of ten years at hard labor, and that the sheriff of Watauga county convey the prisoner to the state's prison."

The defendant failed to appeal from this judgment and was sent to the state's prison where he is now confined, and at this term of the court he filed a petition for a *certiorari* to be issued to the clerk of the superior court of Watauga county directing him to transmit to this court a transcript in the above entitled cause.

Upon consideration of the petition, it appearing that the defendant had shown satisfactory excuse for his failure to appeal from the judgment rendered against him in the su-

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perior court, the writ was ordered to be issued. It was issued and the clerk has sent up a transcript of the record in the case as above set forth.

The record presents an anomalous case. A citizen is condemned to ten years' imprisonment in the state's prison, at hard labor without any presentment of a grand jury or bill of indictment, or any charge whatever made against him of the commission of the crime for which he has been so severely punished, simply upon his own confession in court of being guilty of a crime which there is no pretence he had ever committed.

The matter was *coram non judice*. The judge had no more power to sentence the defendant to imprisonment than any private person in the county.

The section of the bill of rights declares that "no person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment or impeachment." And there is no other mode provided in the constitution for the prosecution of felonies.

The judgment pronounced by His Honor was in contravention of this provision of the constitution, and was therefore without authority, and void.

The defendant would be entitled to his discharge at once if it were not for the fact that the indictment is still pending against him for the crime of burglary.

As was held in the case of the *State v. Lawrence*, 81 N. C., 522, the defendant may be brought before the judge at the next term of the superior court for Watauga county, by a writ of *habeas corpus*, to the end that he may be held to answer the indictment for burglary therein pending.

But we are of the opinion he may, in the meantime, by writ of *habeas corpus*, be discharged from his confinement in the state's prison, but should be remanded to the custody of the sheriff of Watauga to answer the said charge of burglary.

STATE v. QUINN.

It may be questioned, however, whether the writ of *habeas corpus* will lie in a case where the defendant is imprisoned by virtue of the judgment of a court of competent jurisdiction of the crime for which he is imprisoned.

In such a case it is provided by section 1624 of "THE CODE," sub-division 2, that the writ should be denied; and sub-division 3 of section 1646 declares the party should be remanded, "for any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged."

This latter provision is as peremptory as that in sub-division 2 of section 1624, and yet this court held in *Ex parte Summers*, 5 Ired., 149, that in a case of imprisonment for contempt, where the court states the facts upon which it proceeds, a revising tribunal may, on a *habeas corpus*, discharge the party if it appears plainly that the facts do not amount to a contempt."

The analogy is very strong between that case and the one we are considering. There, the judge who committed for the contempt had undoubted power to commit for contempt; but here, according to the facts disclosed in the record, the judge had no such case as larceny before him, and his judgment was not only without authority, but was an absolute nonentity; and that being so, we can see no reason why the defendant should not be entitled to the benefit of the writ and be discharged, if it were not for the pending of the indictment against him.

The judgment of the superior court of Watauga county is reversed, and this opinion must be certified to that court.

Error. Reversed.

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ACT OF ASSEMBLY:

1. If a statute be so vague in its terms as to convey no definite meaning to the court or a ministerial officer, it is void. *State v. Partlow*, 550.
2. An act of assembly prohibited the sale of liquor "within three miles of Mount Zion church in Gaston county," and it appeared on trial of an indictment for its violation that there were two churches of that name in the county; *Held*, the act is ambiguous and inoperative. *Ib.*
3. Neither a member of the legislature at the time of the passage of such act, nor other person is competent to testify as to which church it has reference. It is the act of the legislature as an organized body, and its meaning must be ascertained according to the established rules of construction. *Ib.*
4. Constitutionality of, 116 (4).

ACTION TO RECOVER LAND:

1. Where plaintiff in ejectment relies upon the presumption of a grant from the state arising from an adverse possession of thirty years, and introduces deeds which contain no metes and bounds or description by which the land can be located, and offers no evidence of known and visible boundaries; *Held*, that he cannot recover. *Price v. Jackson*, 11.
2. Thirty years' adverse possession, which was formerly held to be a presumption of a grant, is now by statute made an absolute bar against the state. But in such case the plaintiff must show a privity between himself and those who preceded him in the possession, and also, that the possession was held up to known and visible boundaries. *Ib.*
3. In case of a lappage, and each bargainee is on his own land, outside the interference, the title will be in him who has the elder title; but if the junior bargainee has had actual adverse possession for seven years with color, he acquires a good title to the part so occupied. Here, the defendant having failed to establish such possession, and the jury having found in favor of the plaintiff, the latter is entitled to recover. *Brady v. Maness*, 135.
4. Where a purchaser in deducing title uses a deed which leads to a fact showing an equitable title in another, he will be affected with notice of that fact. *Johnson v. Prairie*, 159.

5. One who claims title through another, by deed purporting to convey a fee simple, is estopped to deny the title. *Curlee v. Smith*, 172.
6. Declarations of a defendant in ejectment, relating to the claim he sets up to the land, are relevant to the issue and receivable in evidence. *Ib.*
7. Where a will designates and assigns to each of the testator's children a share of his land, it was held that the same was divided among them, and no other proceeding was necessary for that purpose. *Cox v. Cox*, 256.
8. In such case, an action in nature of ejectment is a proper remedy to establish a dividing line between two of the devisees, where their claims as to the location of the tracts devised are in conflict. *Ib.*
9. A devise of two hundred acres to A, adjoining the land he now owns, "beginning at the line near B's and running straight across to the back line toward M's, taking the eighty-two acres first, making out the complement of the balance," is sufficiently certain in its description to admit of parol evidence to locate the tract of two hundred acres—which includes the eighty-two acres. *Ib.*
10. Quantity ordinarily constitutes no part of the description, but when the boundaries are doubtful, it becomes an important element. *Ib.*
11. An unregistered deed for land passes an inchoate legal as well as the equitable title, and the registration completes the title. *Austin v. King*, 286.
12. As an unregistered deed does not pass the complete legal title, it may be surrendered or destroyed, and the grantor thereby reinvested with the title, provided the same be done by agreement of the parties and in good faith, and not to the prejudice of third persons. *Ib.*
13. In ejectment, upon trial of an issue as to whether an unregistered deed was surrendered to the party under whom the plaintiff claimed, the defendant, for the purpose of showing it had not been surrendered, offered in evidence a will under which he claimed and in which the testator recognized the land as his own. The plaintiff objected, upon the ground that the evidence thus furnished was a declaration of the testator and in his own interest, and the court sustained the objection, but admitted the evidence "as a circumstance" to be considered by the jury; *Held*, error—whether it be treated as a "declaration" or a "circumstance," the effect is practically the same. *Held further*, that the will is incompetent evidence upon the issue. *Ib.*
14. Title of grantor divested from time of delivery of deed which is subsequently registered. *Gadsby v. Dyer*, 312 (3).
15. Where two parties are in possession of land, the possession in law follows the title. *Ib.* (5).
16. A party who relies on thirty years' adverse possession to presume a grant, is not bound to show that he and those under whom he claims held the possession and claimed the land up to visible boundaries, under the law as it existed when this action was brought. *Fount v. Miller*, 331.
17. The title to a widow's dower cannot be established by showing merely an entry on the docket and the report of a jury. But where the original papers in the proceeding for dower are proved to be lost, parol proof of their contents is admissible, in aid of her title; and the defects in the record are supplied by the presumption arising from the long possession (here thirty-six years) by the widow of the land described in the report, accompanied by the acquiescence of the heirs-at-law; and every matter

connected therewith that can be reasonably presumed, has the force and effect of proof. *Ib.*

18. A long acquiescence of adverse parties in the possession of land by another, will warrant the court in assuming the existence and loss of record-links in making up his title, the lapse of time varying with the conditions under which the records were kept and the casualties to which they were exposed. *Ib.*
19. Where the maker and subscribing witnesses to a deed are dead, proof of the hand-writing of one of the witnesses thereto is sufficient to authorize its probate and registration; and if the witness states he is well acquainted with the handwriting of the deceased witness, he is qualified to testify; and if the land is situate in two counties, probate of the deed before the clerk of either county is sufficient. *Davis v. Higgins*, 382.
20. An ancient deed accompanied with possession is evidence of color of title without proof of its execution; and an unregistered deed, where there has been a continuous adverse possession for seven years, is also evidence of color of title. *Ib.*
21. The rule that plaintiff is entitled to recover all the land described in the deed to himself, not covered by actual occupation or *possession pedis* for thirty years, does not apply to a case where the evidence shows that defendant's possession, extending over that period, was under deeds with definite boundaries professing to pass title. *Ib.*
22. In ejectment where it is alleged that the jury gave undue weight to evidence they were directed not to consider in fixing a disputed boundary, the complaining party must seek his remedy in a motion for a new trial addressed to the discretion of the presiding judge. An assignment of error upon such ground will not be entertained here. The court intimate that in this case the excluded evidence (declaration of grantor in a deed) is competent in aid of location of boundary of a tract of land adjoining the grantor's. *Fry v. Currie*, 436.
23. The surveyor's testimony and the declarations of the aged persons, since deceased, bearing upon the location, were properly left to the jury, who alone must determine the value of the evidence as tending to show the true position of the land in dispute. The court cannot coerce them to find a fact upon evidence they disbelieve. *Ib.*
24. Where, in ejectment, both parties claim under the same person, neither can deny the title of such person; and this, although one of the parties claims under a sheriff's deed. *Ryan v. Martin*, 464.
25. In such case it is not necessary for the plaintiff to show that the defendant has a complete title, but simply that he claims under the common source, even though it be through an unregistered deed or contract of purchase; and the defendant is at liberty to show a better title in himself obtained from other sources. *Ib.*

ACTION TO RECOVER LAND :

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ADOPTION OF CHILDREN :

1. The provision in *Battle's Revisal*, ch. 1, § 8, allowing children to be adopted

and to inherit as children born in wedlock, only has reference to cases of the intestacy of the person standing *in loco parentis*. *King v. Davis*, 142.

2. Where prior to the issuing of such letters of adoption, the party adopting made his will bequeathing certain property to the child afterwards adopted; *Held* that such bequest takes the case out of the statute providing for after-born children. Rev. Code, ch. 119, § 29. *Ib.*
3. If any provision is made for an after-born child, the court cannot say that it is inadequate. The statute only applies when no provision at all has been made. *Ib.*
4. Whether the adoption creates the parental relation only from the date of order, or whether the statute is retroactive and establishes the relation of parent and child from the birth of the child—*quære*. *Ib.*

ADVERSE POSSESSION, with color, 185, 331.

Of thirty years, now a bar against the state, 11 (2), 331.

AFFIDAVIT:

Of surety to appeal, 92.

In attachment, 483.

AGENCY:

1. Where plaintiff alleged an agency, the liability of the agent and a demand upon him to account and pay over, and defendant denied the alleged agency; *Held* that while the plaintiff must prove the agency, yet the denial of the agency relieves him from proving a demand upon the defendant before suit brought. But where the agency is admitted, such demand must be proved. *Waddell v. Swann*, 108. See also *King v. Forcue*, 116.
2. The court suggest the proper issue to be submitted on another trial, and the manner in which the seeming variance between the allegations and the proofs may be put out of the way. *Ib.*
3. Declarations of a principal, made after the completion of an act performed by an agent, are not competent to show that the agent had authority to perform such act. *Johnson v. Prairie*, 159.
4. Although such evidence was directed to the judge, in order that he might find the preliminary fact that there was *prima facie* evidence of an agency, yet, if improperly received, a new trial will be awarded. *Ib.*
5. Where a party contracts as "agent" without disclosing his principal, *quære*, whether it is not his personal undertaking and to be so construed, although a jury find that he contracted as agent and not as principal. *Stamps v. Cooley*, 318.

AGENCY:

Where one co-obligor acts as agent of others, they are bound by his acts, 39.
Coupled with an interest, 70 (2).

AGRICULTURAL SUPPLIES:

Chattel mortgage, 99.

AMBIGUITY in statute cannot be helped by parol, 550.

AMENDMENT OF WARRANT:

1. The court has the power to amend a justice's warrant in a criminal action, in form or substance, but the amendment must not change the nature of the offence intended to be charged. THE CODE, §908. *State v. Vaughan*, 582.
2. Whether such power to amend is to be exercised, is discretionary with the presiding judge. *Id.*
3. The provisions of section 908 are not in conflict with the constitution, *State v. Crook*, 538.
4. Article one, section thirteen of the constitution, providing that no person shall be convicted of crime but by the unanimous verdict of a jury, and giving the legislature power to provide other means of trial for petty misdemeanors with the right of appeal; and section twelve, to the effect, that no one shall be held to answer a criminal charge, "except as herein-after allowed" but by indictment, &c., discussed and interpreted by MERIMON, J. *Id.*

ANCIENT DEED, color of title, §82 (2).

APPEAL:

1. The rule in reference to an oral waiver of the statutory mode of appeal, announced in *Adams v. Reeves*, 74 N. C., 106, and the cases herein cited, approved. *Office v. Bland*, 1.
2. An appeal bond is of no effect unless it be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. THE CODE, §580. *Turner v. Quinn*, 92. See also *Anthony v. Carter*, 229.
3. A motion to dismiss an appeal, upon the ground that the appellant did not cause the same to be docketed in accordance with Rule 2, will not be granted, where it appears that the appellee has also failed to comply with its requirements. One who seeks benefit under the Rule must himself observe it. *Barbee v. Green*, 158.
4. An appeal bond made payable to the state is void. The state will not become a trustee for a citizen in the pursuit of his personal rights, except in cases especially provided by law—as guardian bonds, &c. *Dorsey v. Railroad*, 201.
5. An appeal bond must be accompanied by an affidavit of one of the sureties that he is worth double the amount specified therein (*Turner v. Quinn*, ante, 92). Though the justification of two sureties may be equal to double the amount of the undertaking, yet it is not a compliance with the statute, which is peremptory, and the court cannot disregard it. *Anthony v. Carter*, 229.
6. An appeal will be dismissed on motion of the appellee where the undertaking is not filed within ten days after appeal taken, and not justified by one surety that he is worth double the amount specified therein. Verbal agreements to waive the statutory requirements will not be regarded. *McCanless v. Reynolds*, 244.
7. The writ of *certiorari* will be granted, where it appears that the appellant in apt time submitted the case on appeal to the appellee's counsel, who

declined to sign it, but suggested that he would prepare another and get the judge to settle the case, and agreed that no advantage would be taken of the delay, but failed to prepare a case. The appellee waived the code-time and cannot take advantage of his own negligence. The power of this court over writs of *certiorari* touched upon. *Mott v. Ramsay*, 249.

8. Where an appeal is taken, the record should be transmitted to this court and the appeal docketed, whether the case is settled or not, so that all proper action can at once be taken to perfect it for hearing. The *certiorari* is allowed. See *Mott v. Ramsay*, ante, 249; *Owens v. Phelps*, 253.
9. Upon motion to dismiss an appeal because the bond was not filed within ten days after rendition of judgment, it appeared that the undertaking recited the judgment as having been recovered on the first day of the term, following the fiction that refers all the business of the term to its beginning, but the trial in fact took place during the second week and the date of the justification is within ten days thereafter; *Held*, the motion will not be allowed. *Worthy v. Brady*, 265.
10. An objection to an undertaking on appeal, based upon the fact that it is not signed by any surety but only by the parties to the record, cannot be sustained where it appears from the record that the judgment appealed from does not affect the party whose signature gives the security required. *Syme v. Badger*, 272.
11. Although the word "defendants" is used in the transcript to designate those who take the appeal, yet the record shows that the judgment here is against only one defendant, and in his representative character, and he alone, in law, is the complaining appellant. *Ib.*
12. This court will not entertain appeals upon detached rulings upon some of the matters in dispute; but all matters necessary to a disposition of the case should be passed on and settled in a single trial, and the whole case brought up on appeal. The method of disposing of this controversy pointed out by SMITH, C. J. *Arrington v. Arrington*, 301.
13. The ruling in same case 89 N. C., 185, approved, to the effect that where a judge goes out of office before settling a case on appeal, a new trial will be awarded unless the parties afterwards agree upon a statement of the case. *Shelton v. Shelton*, 329.
14. A fund raised by sale under decree is not transferred to this court by appeal from a judgment directing its distribution, and hence no application to make a disposition of it by investment, pending the appeal, will be entertained here. *Hinson v. Adrian*, 372.
15. The appeal arrests all proceedings in the court below upon the judgment appealed from, but does not withdraw from it the authority to order that proper security be given for the safe keeping or investment of the fund, pending the appeal. *Ib.*
16. Motion to dismiss appeal will be allowed where there is no waiver of the undertaking and no money deposit in lieu thereof, and where the bond is not justified in double the amount specified therein. *Bailey v. Rufus*, 420.
17. Effect of appeal upon matter included in the action but not affected by the judgment appealed from, discussed. *Penniman v. Daniel*, 431.
18. Where an appeal is not prosecuted according to law, the appellee has the right to have a transcript sent up, or a certificate of the clerk that an ap-

peal was taken, and the case docketed and the appeal dismissed. Rule 2, §7, (89 N. C., 598). *Cross v. Williams*, 498.

19. An appeal will be dismissed, on motion of the appellee, where the surety to the undertaking fails to justify that he is worth *double* the amount specified therein, unless there be a waiver in writing on the part of the appellee, or unless a sum of money, in lieu of an appeal bond is deposited with the clerk by order of the presiding judge. Cases in which a waiver will be presumed, reviewed by MERRIMON, J. *State v. Wagner*, 521.
20. The transcript of record on appeal should be drawn in accordance with Eaton's Forms. The transcript in this case is so imperfect that the court *ex mero motu* ordered a writ of *certiorari* to issue. *State v. Butts*, 524.
21. Where it appears that the appellant served no case upon the appellee and the judge makes the statement of the case on appeal, it is presumed that he did so by consent of parties. *State v. Crook*, 538.
22. But when the record presents the exceptions necessary to enable this court to pass upon them, no formal statement of a "case" need be made. *Ib.*
23. Appeal does not lie from interlocutory judgment in state case. *State v. Polk*, 652.
24. Where judge goes out of office, 4.

ASSAULT AND BATTERY:

1. While a wife has a right to fight in the necessary defence of her husband, yet, if she use excessive force, she is guilty; whether such force was used, and whether she acted freely or under constraint of her husband, were questions properly submitted to the jury upon the evidence in this case. *State v. Bullock*, 614.
2. Where the defendant committed an assault and battery upon his wife, with great violence, such as appears by the facts found in the special verdict here, *it was held*, that the serious damage done excluded the jurisdiction of a justice of the peace to hear and determine the case. *State v. Huntley*, 617.
3. The question as to what is a "deadly weapon," and what is "serious damage," under the statute giving jurisdiction to justices to try assaults, &c., discussed by MERRIMON, J. *Ib.*
4. In indictments for assault with intent to kill or commit rape, the *intent* must be averred. *State v. Russell* 624.
5. Where an assault is charged to have been committed with a deadly weapon, the *character* of the weapon must be averred. *Ib.*
6. Where the indictment charges an assault by which serious damage was done, the *extent* of the injury must be averred. *Ib.*
7. Though the indictment charge an assault with a deadly weapon without stating the particular kind of weapon used, and it does not appear by the record or the case that the same was found within six months after the commission of the offence, the indictment will be sustained for a simple assault and battery and the superior court will hold jurisdiction and determine the matter. *Ib.*
8. Jurisdiction in assaults, &c., 556.

ATTACHMENT:

1. In attachment proceedings, where an appeal is taken and the decision may dispose of the case altogether, it is discretionary in the court below to proceed upon matter collateral to the main purpose during the pendency of the appeal; hence a motion to dismiss the action upon the ground that the plaintiff's failure to proceed and make the defendant a party by publication, before the appeal was determined, worked a discontinuance, was properly overruled. *Penniman v. Daniel*, 421.
2. Effect of an appeal upon matter included in the action and not affected by the judgment appealed from, discussed by SMITH, C. J. *Ib.*
3. A discontinuance results from the voluntary act of the plaintiff in not proceeding regularly with the case by the issue of the successive connecting processes. *Ib.*
4. *Quere*—Whether an attachment prosecuted, on notice by publication of the seizure of the debtor's property, to final judgment, is a proceeding *in rem* or *in personam* under the present law. *Ib.*
5. Service of process by publication in attachment must be made in strict compliance with the statutory requirements; but a mere irregularity in the steps preliminary to publication will not affect the validity of a judgment obtained upon such service, while it is sufficient ground for an application to set the judgment aside. *Spillman v. Williams*, 483.
6. In attachment proceedings, the insufficiency of an affidavit does not render the whole proceeding void: it makes the judgment irregular only, no liable to be impeached collaterally. *Ib.*

ATTORNEY'S FEES, 308.

BANKRUPTCY:

1. A debt provable under the bankrupt act (if not a fiduciary debt) is extinguished by the discharge in bankruptcy. *Parker v. Grant*, 338.
2. An administrator cannot waive the fact of his intestate's discharge in bankruptcy, though he may elect to plead the statute of limitations. *Ib.*

BILL OF LADING, stipulations in, 31.

BOND:

- Alteration of, does not vitiate, when, 39.
- Of clerk as receiver, liability, 48.
- Made to the state, when void, 201.
- On appeal, and matters relating thereto, see appeal.

BUTCHER'S KNIFE, included in meaning of statute against carrying concealed weapons, 545.

CAUSE OF ACTION, 304.

CERTIORARI—see Appeal.

CHARACTER OF WEAPON, 624.

CHattel MORTGAGE, 99.

CHILDREN, adoption of, 142.

CLAIM AND DELIVERY:

Where claim and delivery is brought to get possession of property for the purpose of selling it, according to the terms of a contract, to pay an indebtedness, and all parties interested are before the court and the amount due ascertained, the plaintiff upon recovering holds as a trustee, and a judgment, directing an adjustment of all the equities involved in order that the matter may be determined, is the proper one to be rendered; and if possession of the property cannot be had, then the judgment should be in the alternative. *Austin v. Secrest*, 214.

CLAIM AGAINST THE STATE:

1. The state (not the public treasurer) is the proper party defendant in an action wherein the plaintiff demands the return of bonds alleged to have been exchanged for other bonds in 1862, and the jurisdiction to hear such claim, it being one against the state, is exclusively lodged in the supreme court. *Martin v. Worth*, 45.
2. This case differs from *Rand's case*, 65 N. C., 194, merely in the fact that the bonds were taken up with an issue of state treasury notes instead of the issue of other bonds. *Ib.*

CLERK OF THE SUPERIOR COURT:

1. The office of probate judge is abolished and the duties thereof now devolve upon the clerk of the superior court, and in such cases he has a special jurisdiction which is distinct and separate from his general duties as "clerk of the court." *Brittain v. Mull*, 498.
2. Where issues of fact are joined before the "clerk" in the exercise of his special jurisdictional powers as a distinct tribunal, the issues must be transferred to the "superior court"—another jurisdiction—to be tried, and when tried must be *remanded* to the clerk; and so also, where an appeal is taken in like cases from his decision upon a question of law, the judge decides it and remands the case. *Ib.*
3. But the exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the clerk stands as that of the court, if not excepted to and reversed or modified on appeal, as allowed by the statute. *Ib.*
4. Special proceedings ordinarily are proceedings in the "superior court," and where in such cases issues of fact are raised, the clerk transfers them to the civil issue docket for trial by jury at term; or where issues of law are raised and decided on appeal by the judge, at term or in vacation, the issues so found are not *remanded* to the clerk—the whole proceeding being in one record and in the same jurisdiction; but the court, through the clerk, will proceed accordingly as the statute directs; *Hence*, in a special proceeding for dower, as here, the issues found or decisions of law made, are not *remanded*, but the court, through the clerk, proceeds according to law. *Ib.*

CLERK'S BOND, liability of, when clerk appointed receiver, 48.

COLOR OF TITLE, 382 (2).

COMMERCIAL FERTILIZER TAX, by whom paid, 389 (2).

COMMISSIONS, when allowed, 308, 339 (3).

COMMON CARRIER, negligence of, 31.

COMMUNICATION WITH PERSON DECEASED, 106, 139, 226.

CONCEALED WEAPONS:

1. One is not guilty of a violation of the statute prohibiting the carrying of concealed weapons, where it appears that he had a pistol in his pocket for the purpose of delivering it to the owner who had sent him for it. The facts here show that there was no criminal intent. *State v. Brodnaz*, 543.
2. The mischief provided against is the practice of wearing weapons concealed about the person to be used upon emergency. *Id.*
3. The act of assembly making it indictable for one to carry concealed about his person any "pistol, bowie knife, razor or other deadly weapon of like kind," embraces a butcher's knife. *State v. Erwin*, 545.
4. The words "other deadly weapons of like kind" imply simply similarity in the deadly character of weapons, such as can be conveniently concealed about one's person to be used as a weapon of offence and defence. *Id.*

CONFESSIONS:

Of witness and party charged, distinction between, and when admissible, 582 (3).

CONSEQUENTIAL DAMAGES, 490.

CONSTRUCTION OF DEVISE, not entertained, when, 282.

CONTRACT:

1. A contract made by an officer of a corporation and ratified by the corporation, becomes the contract of the latter. *Greenleaf v. Railroad*, 33.
2. Where a writing does not contain the *entire* contract between the parties, parol evidence of an independent verbal agreement is admissible. The written contract, here, to pay for work on defendant's railroad *after* the grade was lowered, has no bearing upon the issue as to how much the plaintiff is entitled to recover for work done under a verbal contract *before* the grade was lowered. *Terry v. Railroad*, 238.
3. The letter of a partner submitting propositions in reference to the sale of goods, in response to inquiries of the defendant, is admissible upon trial of an action to recover the price of the goods, as bearing on the contract of sale. *Brown v. Atkinson*, 339.

4. Where a company in Baltimore agrees with a merchant in North Carolina "to give him the right to sell" its commercial fertilizer in this state, the contract is to be interpreted as meaning the *privilege* of selling, which privilege must be acquired by payment of the license tax by the company. *Ib.*
5. Parol evidence is admissible to show the custom or usage of a place where a contract is entered into; and this, upon the principle, that it is presumed the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to such usage. *Ib.*
6. The plaintiff sues an executor for compensation for services rendered by his testator during the latter part of his life, upon an alleged promise of the testator. The defendant sets up, by way of counter-claim, a contract of lease between the testator and the plaintiff, under which the plaintiff entered upon the land, and in which it was agreed that the latter should have the farm for five years upon his furnishing a support to the testator and his wife; and further alleges that plaintiff has cut down the timber on the premises and sold the same for a considerable sum and appropriated it to his own use. The plaintiff, in his replication, denies the counter-claim and his liability as alleged; *Held*, error to refuse to submit an issue to the jury (tendered by defendant), as to whether, during the life-time of the testator, the plaintiff cut and appropriated the timber, as alleged, and the value of the same; and also the facts involved to the alleged counter-claim. *Wall v. Williams, 477.*
7. *Held further*, The separation of the trees from the land converted them into personal property, but the title to them at once vested in the owner of the land. *Ib.*
8. Where personal property is tortiously taken and sold, the owner may waive the tort, affirm the sale, and recover upon a count for money had and received to his use. *Ib.*

CONTRACT TO CONVEY LAND:

Contracts to convey land are not available in law and cannot be admitted in evidence in an action for specific performance, until proved and registered. THE CODE, § 1245. *White v. Holly, 67.*

CONTRACT:

- Of insurance agent, 69.
- Executory, 99.
- Of lease, 316.
- Illegality of, 449.
- With corporation, 464.

CONTRIBUTORY NEGLIGENCE, 471.

COPY OF WILL to be recorded, 173 (5).

CORPORATIONS:

1. The rule announced in *Stanley v. Railroad*, 89 N. C., 331, to the effect that in a suit against a railroad company it may designated by its corporate name, affirmed. *Ramsay v. Railroad*, 418.
2. A corporation was sued upon a note executed by its president, and the recovery was resisted upon the ground that under its by-laws the president had no power to bind the company without the concurrence of three of its directors, (which was not given) and upon the trial a verdict was rendered establishing the fact the company borrowed the money and used it in its business and executed the note sued on; *Held*, that the defendant is concluded by the verdict. *Kenner v. Mfg. Co.*, 421.
3. *Held further*, that where the defendant company relies as a defence upon the statute, which declares that such contract shall be in writing, and shall state whether the stockholders are individually liable for the contracts of the company (Bat. Rev., ch. 26, § 23), the same must be pleaded in proper form, otherwise it will not be considered. *Ib.*
4. A verdict adverse to the defences set up leaves nothing to be done except to render judgment for the plaintiff. This case does not stand as upon demurrer or a motion in arrest of judgment. *Ib.*
5. Where a corporation sues it is necessary for it to prove its character and organization, if denied. But where one contracts with a corporation or claims title to land under it, the presumption is that, as to such party, there is a corporate existence. *Ryan v. Martin*, 464.
6. A contract with a party, by name implying a corporation, is to be taken as evidence of the existence of the corporation as to the party contracting with it, rather than an estoppel to disprove such fact. *Ib.*
7. A misnomer of a corporate body, when the parties intended the corporation by its proper name, is not material; and it is competent to prove its name by proper evidence. *Ib.*

CORPORATIONS:

Contract of, 33 (2).

Non-resident stock in, not taxable here, 464.

Power exercised under charter, 490.

COSTS:

1. Where a reference was made upon demand of one of several defendants in his answer, the admission of the allegations in the complaint by another of the defendants will not relieve the latter from paying his proportionate part of the costs of the reference. *Wharton v. Gattis*, 33.
2. The court intimate that the mode of apportionment of costs among persons all liable, is a matter of discretion in the judge below. *Ib.*

COUNSEL, suggestion of, not regarded. Court confined to record, 34 (4).

COUNTER-CLAIM:

1. A counter-claim includes any defence (except a demurrer) which does not amount to a plea in bar. **THE CODE**, § 244. *Hurst v. Everett*, 390.
2. But, strictly, a counter-claim is a cross-action against the plaintiff in

which the defendant may have affirmative relief; but it must, like a complaint, state the cause of action and demand the relief to which the defendant alleges he is entitled; and it therefore falls under the limitation to the jurisdiction of a justice of the peace. *Id.*

3. And if no relief be prayed, it is not a cross action, but may be either a set-off or recoupment:—

A set-off, when the defence is a distinct and independent cause of action arising in contract, and out of a transaction extrinsic to the plaintiff's cause of action;

A recoupment, when the defence is matter growing out of or connected with the subject of the action, that is, a defendant sued for a debt or damages may diminish the damages suffered by himself on account of the plaintiff's breach of the *same contract*. *Id.*

4. Therefore, where plaintiff sues for goods sold and delivered or upon notes given therefor, the defendant may set up a counter-claim for damages sustained by the plaintiff's failure to deliver goods of the quality contracted for, and recoup the damages he has suffered to the amount claimed in plaintiff's complaint; and when several actions are brought in a justice's court upon notes, as here, he has the right to set up such defence in each, until the amount of his damages is exhausted; and on appeal to the superior court where the actions were consolidated, he has the right to recoup the whole amount of such damages. *Id.*

See also page 477.

CRIMINAL INTENT, 643.

CUSTOM, proof of, 389 (3).

DAMAGES:

Measure of, 109.

Resulting from fire, 275.

Recovered by personal representative, to whom payable, 308.

Consequential, 490.

DEADLY WEAPON, what is, 617.

DECLARATIONS:

Of persons not witnesses, hearsay, 165.

Of defendant in ejectment, admissible, 178 (4).

Of testator, when inadmissible, 286 (3), 311, 312.

Of accused, 529 (3).

DEED:

Construction of trust, 230.

Proof of contents of lost deed, 231.

Attacked for fraud in grantor, 265.

Effect of registration of, 286, 312 (5).

Registration authorized on proof of hand-writing of one witness thereto, when maker and subscribing witnesses are dead, 382.

DEMAND IN AGENCY, 108.

DEMURRER TO INDICTMENT 52.

DESCRIPTION of land in will, 256 (3).

DISCONTINUANCE:

A discontinuance results from the voluntary act of the plaintiff in not proceeding regularly with the case by the issue of the successive connecting processes. *Penniman v. Daniel*, 431.

DISCRETIONARY POWER :

In amending justice's warrant, 532, 536.

Granting new trial, 564, 654.

In taxing costs, 53 (2).

In opening and concluding, 214.

DISSENTING OPINIONS:

Brittain v. Mull, 498. Ashe, J.

Clark v. Railroad, 506. Merrimon, J.

State v. Huntly, 617. Smith, C. J.

DOCUMENTS, opposite counsel have right to see, 599 (6).

DOWER:

1. A widow filed her petition for dower which was assigned her in the land in controversy. In a subsequent proceeding for partition the heirs at law contended that she had forfeited her dower by a second marriage, &c., and upon an issue submitted the jury find that dower had been assigned; *Held*, that the court will assume the proceeding in dower to have been regularly conducted, and that the heirs were parties to it and therefore estopped by the judgment therein. *Wood v. Sugg*, 93.

2. A widow who elects to take under her husband's will, is not entitled to dower. But so much of the land as does not exceed the quantity to which she would be entitled by right of dower, is exempt from her husband's debts, during her life. THE CODE, § 2105. There is nothing in the case entitling the plaintiff to any equitable relief in respect to her claim of dower. *Shackleford v. Miller*, 181.

See also page 331.

DRUMMER'S LICENSE:

A drummer is not protected from the penalty denounced by statute against persons selling goods without license, unless he shall be in the actual possession of the license while doing business. Acts 1883, ch. 136, § 28. (In this case the license was mailed to defendant but not received by him at the time the sale was made). *Lewis v. Dugar*, 18.

DYING DECLARATIONS, 581 (4).

EJECTMENT—See Action to recover land.

EMBEZZLEMENT, whether a felony or misdemeanor, 561.

ENDORSEE, rights of, 7.

EQUITY:

Relief against judgment, 148.

Equitable title, 159, 160.

Does not relieve against penalty for purpose of allowing action for damages, 317 (2).

Equitable right of ward to sue, 407.

ESTOPPEL:

By former judgment, 83 (3), 93, 322.

On married women and infant, 149 (4).

By deed, 173 (3), 201 (2).

When it has effect of evidence, 464.

EVIDENCE:

1. The declarations and opinions of persons not witnesses are incompetent evidence upon the question of one's capacity to make a deed; *Hence* the question—have you ever heard any one say that the grantor was wanting in capacity?—was properly ruled out. *Barker v. Pope*, 165.
2. But the opinion of a witness founded on actual observation and personal knowledge of the state of the grantor's mind, is admissible. *Ib.*
3. Hearsay evidence and its incompetency to establish a fact, discussed by ASHE, J. *Ib.*
4. The recitals in a sheriff's deed are *prima facie* evidence of the sale and execution, and this rule is not varied by the fact that the deed was made by the sheriff after he had gone out of office, (THE CODE, § 1267) where the recitals correspond with his return upon the execution, made while he was in possession of the office. *Curlee v. Smith*, 172.
5. The return upon an execution is *prima facie* evidence of what it states, and, where the execution is proved to be lost, the entry on the minute docket of the execution and its return is admissible as secondary evidence to show that a writ of *venditioni exponas* issued to the sheriff, and was in his hands at the time of the sale. *Ib.*
6. The production of papers containing evidence relating to the merits of an action will be ordered by the court; and when produced, they are competent evidence for all legitimate purposes. *Austin v. Secrest*, 214.
7. The private act of 1878 to restore the records of Watauga county, which were destroyed by fire, is not a repeal but in aid of the common law rules for establishing lost deeds, and a party may elect to proceed under either mode. *Cowles v. Hardin*, 231.

8. Where a deed in such case is proved to have been destroyed, the contents, probate and registration thereof may be established by secondary evidence, and the register of deeds is a competent witness to prove its destruction, contents, &c. *Ib.*
9. While improper evidence ought not to be allowed, yet, when it is, the opposing party may be permitted to rebut it by like evidence, and if it be seen that no injustice results therefrom, a new trial will not be granted. *Austin v. King*, 286.
10. In an action to convert a deed absolute upon its face into a mortgage, the declarations of the grantor that he owed the grantee money and wished to sell the land to pay it, made after the deed was executed, and while he was in possession of the *locus in quo* jointly with the grantee, are incompetent. *Gadsby v. Dyer*, 811.
11. One cannot introduce evidence to discredit his own witness, yet if a witness testify to facts which make against the party who called him, the party is not precluded from showing these facts to be otherwise, notwithstanding such evidence has the effect of indirectly impeaching his own witness. *Ib.*
12. The title of a grantor is divested from the time of the delivery of the deed which is subsequently registered. *Ib.*
13. Heirs can only attack a deed of their ancestor for fraud or undue influence used in bringing about its execution; and in such case, only such declarations as tend to prove such fraud or undue influence, made after the conveyance and with unchanged possession, are received. Or, such declarations may be proved in disparagement of the title inferred from possession and use. *Ib.*
14. Where two parties are in possession of land, the possession in law follows the title. *Ib.*
15. Declarations made in the absence of the party to be prejudiced by them are not admissible as against such party. *Ib.*
16. Proof by the sheriff that he had an execution in his hands at the time of sale is competent when the execution is lost. *Ryan v. Martin*, 464.
17. An exception to evidence should state the testimony that this court may see and determine its effect. *State v. Williford*, 529.
18. What a defendant says is always received against him when pertinent to the issue, but not for him unless it be a part of the *res gestæ*; hence on trial of an indictment for forcible trespass, it was held no error to exclude the declarations of defendant while on his way to the prosecutor's house. *Ib.*
19. On trial of an indictment for perjury, assigned in an alleged false oath taken in a bastardy proceeding, in which the defendant swore he never had sexual intercourse with the prosecutrix, the prosecutrix testified she never had such intercourse with any other man than the defendant; Held, that the defendant for the purpose of discrediting her testimony had the right to show by a witness that he (witness) had often been criminally intimate with her for several months preceding the birth of the child. *State v. Jones*, 629.

EVIDENCE :

- In agency, 160, (5, 6).
- In ejectment, 173, (4), 382, 381, 496.

Of contract, 236.
 Parol, locating land, 256 (3).
 Of custom, 339 (3).
 In libel, 444.
 Not admissible to show what legislature meant, 550.
 In murder—see homicide.
 Removal of fence, 632.

EXCESSIVE FORCE, question for jury, 614.

EXECUTIONS, return on, evidence, 172.

EXECUTORS AND ADMINISTRATORS :

1. Where in a suit for a legacy, it is made to appear either by the complaint or the admissions in the answer, that there is no necessity for retaining the fund by the executor (such as outstanding debts, assets not collected, &c.), the court may within two years after the qualification of the executor, adjudge the payment of legacies. THE CODE § 1512. *Clements v. Rogers*, 63.
2. The objection of the defendant that the action was brought within two years, and that there was no allegation in the complaint why the court should adjudge a payment before the lapse of the two years, is waived by his filing an answer to the merits and consenting to have the case put upon the calendar for trial. The order dismissing the action is erroneous. *Ib.*
3. Where an executor dies leaving unadministered assets in his hands, the administrator *de bonis non* of the testator must be made a party to an action against the representative of the deceased executor, in which the next of kin or legatees seek a settlement of the estate. *Hardy v. Miles*, 131.
4. If such administrator refuse to join as plaintiff, he may be made a party defendant. *Ib.*
5. Sale of land by executor and his purchase of the same through an agent, is a nullity. *Howell v. Tyler*, 207-8.
6. An administrator who recovers damages of one for negligently causing the intestate's death, holds the fund solely for the use of those entitled under the statute of distributions, and free from the claim of creditors and legatees (THE CODE, § 1500), subject, however, to commissions and reasonable counsel fees. *Baker v. Railroad*, 308.
7. The portion of the recovery due the widow in this case, released to the defendant, is chargeable with its share of such expenses, and the defendant gets no benefit under the assignment until the *pro rata* amount thereof is ascertained and paid.
8. While an administrator may or may not plead the statute in bar of the recovery of a debt due by his intestate, or retain a debt due himself, though barred, for in such case the obligation continues and the remedy only is suspended, yet he cannot waive the fact of the intestate's discharge in bankruptcy, for in that case the debt is extinguished. *Parker v. Grant*, 333.

9. An administrator cannot make an extra charge for personal attention to the affairs of the estate. Commissions are allowed for this service. *Ib.*
10. Administrator filed petition against heirs of intestate to sell land for assets; issues were joined and the proceeding transferred to court in term, and upon the trial the issues were found in favor of the administrator; the judge gave the license to sell and also directed how the proceeds of the sale should be applied; *Held*,
 - (1) The court intimate that the judge had no power to order the sale.
 - (2) The jurisdiction to direct the application of the proceeds is exclusively in the clerk.
 - (3) The plaintiff in this case was not a party to the special proceeding for the order to sell, and is therefore not concluded or affected by the judgment therein rendered. *Moore v. Ingram*, 378.
11. A judgment consisting of several distinct and independent parts may be good as to one part and erroneous as to the others. *Ib.*
12. A judgment against an administrator founded upon a debt of the intestate contracted for the purchase of land, has no precedence over debts of the same class to be satisfied out of the assets raised by the administrator under an order to sell the land. *Ib.*
13. There is no homestead right involved here; nor does the vendor's lien obtain in this state. *Ib.*
14. In an action for an account and settlement, the death of the defendant being suggested, his executor comes in and is made a party defendant and moves for leave to file an answer denying that he has assets; *Held*, that the question of assets does not arise here, and the motion cannot be allowed. If plaintiff obtains judgment, it only ascertains the debt which must share in the assets that may come into the executor's hands, according to its dignity, when the estate is settled. *Grant v. Bell*, 485.

EXECUTORS AND ADMINISTRATORS:

Pleading, 78.

Suit against, for services rendered testator, 477.

EXECUTORY CONTRACT, 99 (2).

FALSE PRETENCE:

Where the defendant obtained goods from the prosecutor by falsely stating that they were needed to bury a sister-in-law's child who had just died; *Held*, that he is guilty of false pretense, and it matters not whether the owner parted with his goods for the sake of gain or for a charitable purpose. *State v. Matthews*, 635.

FEEES OF COUNSEL, when allowed, 308.

FELONIOUS INTENT, 640.

FELONY, what, by statute, 561.

FENCE, removal of, 682.

FERTILIZER TAX, 389 (2).

FICTIO JURIS, 265 (1).

FORNICATION AND ADULTERY:

In fornication and adultery, the law does not require direct proof of acts of criminal intercourse to warrant conviction; but it is sufficient to show facts and circumstances that will satisfy the jury of the existence of such intercourse. *State v. Eliason*, 564.

FRAUD AND FRAUDULENT CONVEYANCES:

1. Where a deed to the grantor's son is impeached as a voluntary gift upon the ground that he did not retain property "fully sufficient and available for the satisfaction of his then creditors," as required by Rev. Code, ch. 50, § 3; *Held*, that such conveyance is valid if not made with a fraudulent intent and enough property is retained for all his creditors. *Worthy v. Brady*, 265.
2. *Held further*: But where such deed provides that the grantee shall support his invalid brothers (naming them) and comply with the conditions imposed, it is not voluntary within the meaning of the above statute, but rests upon a valuable consideration. *Ib.*
3. *Held also*: The operation of such deed does not depend upon the value of the grantor's reserved estate but upon the *intent* with which it was made, shared in by the grantee. And upon the question of intent, evidence of his liabilities and value of his undisposed of property is competent to be considered by the jury. *Ib.*
4. Nor can gifts of visible estate be defeated, where the debtor has resources in stocks or other securities of value to meet his liabilities. *Ib.*
5. The judge's charge is, in substance, responsive to the instructions, that the retained property must be "sufficient and available" for debts. *Ib.*

See also page 312 (4).

FUNDS, under care of court during appeal, 372.

GAMBLING, indictment for, 626.

GRANT, presumption of, 11, 331.

GUARDIAN AND WARD:

1. A receiver appointed to take charge of a ward's estate when the guardian is removed, is not invested with the powers of a guardian, but acts under the control of the court until another guardian is appointed. *Temple v. Williams*, 82.
2. A settlement made with such receiver, even if had under direction of the court, is not conclusive against the ward, but only raises a presumption that the account and settlement are correct; hence, in this case, the

paper writing intended as a "discharge and release" to the defendant administrator, not reported to or sanctioned by the court, can in no way affect the plaintiff's right to an account. Such presumption may be disproved. *Ib.*

3. The plea of estoppel by former judgment, to be available, must show that the claim in suit has been determined in a former action between the same parties. *Ib.*
4. Jurisdiction cannot be acquired over infant defendants except by service of process upon them. *Young v. Young*, 359.
5. The court has no authority to appoint a guardian *ad litem* for infant defendants. This matter is now regulated by a rule of court (89 N. C., 612,) requiring such appointment to be based upon a motion made in writing, and then only after due inquiry as to the fitness of the person to be appointed; and such guardian must file an answer in every case. *Ib.*
6. A bond made payable to a guardian is in equity the property of the ward, and suit may be brought upon it by the ward when the same was turned over in the guardian-settlement, notwithstanding the legal title may have been transferred by the guardian's endorsement to another. *Urry v. Sutt*, 406.
7. Although, as to the endorsee in such case, the three year statute may bar his right of action on the bond, yet that lapse of time does not affect the right of action of the ward (to whom the bond belonged from the moment of its execution) which in this case accrued prior to August, 1898, and is governed by the statutes in force before that date. *Ib.*
8. In such case the right of action was not conferred by section 55 of the Code of Civil Procedure, but that statute simply enlarged the ward's remedy for enforcing a right of action already accrued at law as well as in equity. *Ib.*
9. The law applicable to this case did not require actual service of process upon infant defendants: it was sufficient, if served upon the guardian *ad litem*; and there is no defect in the proceedings resulting in a sale of the land of the infants. *Fry v. Currie*, 436.

HABEAS CORPUS, 680.

HAND-WRITING, proof of, 326, 383.

HEARSAY EVIDENCE, 165, 166.

HIGHWAY, obstruction of, 596, 637.

HOLOGRAPH-WILL, 26.

HOMESTEAD, 376 (4).

HOMICIDE:

1. Where the evidence showed that the prisoner could have escaped the threatened violence of the deceased, but slew him in the difficulty which ensued, and the judge charged the jury, "that if the prisoner was so situated that he could escape, but preferred to shoot rather than escape.

he would at least be guilty of manslaughter." *Held* no error, and the jury were warranted in returning a verdict of manslaughter. *State v. Kennedy*, 572.

2. The words "at least" &c., were used in the sense of "clearly a case of manslaughter," and did not present the case as one of murder or manslaughter—taken in connection with other parts of the charge and the prisoner's plea of self-defence. *Ib.*
3. Where the deceased said repeatedly, "I am bound to die, I am shot in the side and back, and am bleeding internally," and then said he was shot by the prisoner, and died of the wounds in a few days afterwards; *Held* admissible as dying declarations, notwithstanding that a physician, between the time the declaration was made and the death, used language to the deceased calculated to inspire the hope of recovery. *State v. Mills*, 581.
4. Evidence showing that the railroad track was near the place of homicide, and that the "fast train" passed soon after the shooting, was properly admitted in connection with the circumstances attending the alleged homicide. *Ib.*
5. A declaration of the prisoner made a few hours before the homicide, to the effect "that he intended to have satisfaction before he slept that night," was pertinent to the issue and admissible against the prisoner. *Ib.*
6. What the prisoner said after the homicide is not admissible for him, because the declaration is not a part of the *res gesta*.
7. The confession or declaration of a witness made before the trial of another for crime, may be proved to contradict his testimony on such trial; and this, even though the declaration was made under improper influences. What weight is to be given to the declaration is a question to be determined by the jury. Distinction between confessions previously made by the party charged and confessions of a witness not on trial, introduced to discredit the witness, pointed out by ASHE, J., and the rules of evidence governing the admissibility of the same, discussed. *Ib.*
8. Where such declaration offered to contradict is directly material to the issue, it is not necessary to ask the preliminary question to call the witness' attention to it. This is only necessary where the testimony relates to some collateral matter or some act showing the witness' partiality or prejudice towards a party to the action. *Ib.*
9. The practice of directing witnesses for the prosecution to be taken to the office of the prisoner's counsel and there examined by them as to what their testimony will be on the trial, with a view of aiding in the preparation of the defence, is disapproved, and the power of the court to allow it, questioned. *State v. Williams*, 599.
10. The judge may perhaps allow the counsel to converse with such witnesses in presence of some one representing the interest of the prosecution. *Ib.*
11. Where a witness for the prosecution (here an accomplice) was sent by permission of the court and solicitor, at the request of the prisoner, to the office of prisoner's counsel and was there examined by them with a view to preparing his defence, *it was held* to be competent on the trial of the prisoner to prove by one of the counsel the statements made by the witness, for the purpose of impeaching his testimony on the trial—the value of such testimony under the attending circumstances being a question for the jury. *Ib.*

12. The facts here do not interfere with the operation of the rule of evidence which permits proof of declarations of a witness in conflict with his testimony at the trial, bearing directly upon the question at issue, with a view of discrediting the witness. *Ib.*
13. Nor can the impeaching evidence be excluded on the ground that the statements of the witness are in nature of privileged communications. *Ibid.*
14. Where counsel puts a paper in the hands of a witness and asks him whether it is in his hand-writing and then proceeds to found a question on such paper, the opposing counsel has a right to see it. *Ib.*
15. Where the contents of a paper, containing the examination of a witness upon a preliminary investigation of an alleged murder, are not set out in the case on appeal, and it appears that error was assigned in excluding it, when offered as evidence to contradict the witness on the trial, as being in itself incompetent whatever might be its contents; *Held*, that the substance of the paper being made known when offered by counsel, satisfies the general rule which requires that the case must show what the rejected evidence was, so that this court may pass upon the exception. *State v. Pierce*, 606.
16. Upon a trial for murder, the prisoner introduced the coroner and exhibited a paper to him which he swore contained the examination of a witness taken down by him, and also the preliminary examination reduced to writing by a justice of the peace, for the purpose of contradicting the witness; *Held*, that the exclusion of this evidence was error. *Ib.*
17. The English rule in reference to the use of written memoranda in refreshing memory of witnesses, touched upon, and also that requiring testimony of deceased witnesses to be reproduced in the very words, discussed by SMITH, C. J. *Ib.*

HUSBAND AND WIFE:

Partition of land acquired by marriage prior to act of 1846, and deed of husband, 208-4.

Assault and battery, 614.

ILLEGALITY OF CONTRACT, 449.

IMPEACHING WITNESS, 312 (2), 599.

IN FORMA PAUPERIS, 332, (6).

INDICTMENT:

1. An indictment framed under section 3678 of THE CODE, charging the defendant with embezzlement in "wilfully, knowingly and corruptly" failing to pay over a fine to the school fund, is sufficient. Such offence is a misdemeanor, and therefore it was error in the court to arrest judgment upon the ground that the word "feloniously" was omitted. *State v. Hull*, 581.
2. A statutory crime is not a felony unless so declared by the legislature. *Ib.*

3. Nor will an offence be made a felony by the construction of any doubtful and ambiguous words in the statute creating it. *Id.*
4. The doctrine that a crime is a felony where the punishment prescribed is confinement in the penitentiary, does not obtain in this state. *Id.*
5. One is indictable for a violation of the act prohibiting gambling "in any house wherein spirituous liquors are retailed," whether such retailing be with or without license. *THE CODE, § 1042. State v. Hawkins, 626.*
6. On trial of an indictment for removing a fence in violation of *THE CODE, § 1062*, it appeared in evidence that there was a controversy about the dividing line which separates the land of the prosecutor from that of the defendant—the former being in possession but the latter claiming the right to the land; *Held*, that evidence offered to show that the fence was on land belonging to the defendant was properly ruled out. *State v. Marsh, 632.*
7. In such case it is only necessary for the state to show the actual possession of the prosecutor; and it is no defence for the defendant to locate the dividing line and show title in himself. This right must be asserted in a civil action. *Id.*
8. An indictment under *THE CODE, § 1068*, for injury to live-stock, in which the animal alleged to have been injured is described as a "certain cattle beast," is sufficiently definite. *State v. Credle, 640.*
9. On trial of such indictment, the contents of a notice posted by prosecutor forbidding all persons trading for or buying his cattle, may be proved by parol, without showing the loss or destruction of the paper. *Id.*
10. The fact that a criminal offence was committed openly and without secrecy goes to the jury to be considered by them upon the question of the existence of a felonious intent. It does not necessarily disprove it. *Id.*
11. The charge of the court in this case approved. *Id.*
12. Where a statute makes the commission of an act "unlawful," and specifies no mode of proceeding, the violation of its provisions is a misdemeanor punishable by indictment at common law. *State v. Parker, 650.*
13. On overruling a demurrer to an indictment the court should require the defendant to plead, and then proceed with the trial to verdict and judgment. *State v. Polk, 652.*
14. Where a bill is ignored, a new bill charging the defendant with the same offence may be sent to the same grand jury. *State v. Harris, 656.*
15. A defendant charged with burglary, with intent to murder, consented to a mistrial, and pleaded "guilty of larceny," and was sentenced to imprisonment in the penitentiary; *Held*, that his confession of being guilty of a crime not charged in the indictment warranted no judgment against him. *State v. Queen, 659.*
16. But as the original bill is pending against him, he is not entitled to be discharged; a writ of *habeas corpus* will issue in order that he may be taken from prison and held to answer the charge in the court below. *Id.*

INFANTS, when estopped by judgment, 149 (4).

INJUNCTION AND RECEIVER, 221 (3).

INJURY TO LIVE STOCK, 640.

INSANITY, evidence of, 165.

INSURANCE:

1. A contract between a life insurance company and its agent stipulated that the agent should receive as compensation 25 per cent. commissions on the first year payments, and 5 per cent on renewals. The company went out of business and assigned the policies (secured through the efforts of the agent) to another company, which assumed the risks; *Held*, that the agency ceased, and that the contract does not confer a permanent right upon the agent to collect renewals and retain the 5 per cent. commissions. *Ins. Co. v. Williams*, 69.
2. But where an agency is associated with an interest, it cannot be revoked by the principal to the detriment of the agent. What such an agency is, stated by SMITH, C. J. *Id.*

INTENT, criminal, 543.

INTEREST:

1. A verdict allowing "interest to date" in a case where the proof is that the principal sum was due in April, 1876, is sufficiently definite as to the time for which the computation is to be made. *Greenleaf v. Railroad*, 83.
2. Interest is recoverable as an incident to the debt, even though a mortgage deed contains a provision that the property shall be liable for "no more than \$5,000." *Stafford v. Jones*, 189.
3. How computed in certain cases, 240.

IRREGULAR JUDGMENT, § (2))

ISSUES, 477.

JUDGE'S CHARGE:

1. The rule, that an omission of a judge to charge the jury upon a particular point is not error unless asked to do so, is still the law, notwithstanding the provision of THE CODE, § 412 (3) which is in effect that the error alleged need not be put in writing, and may be taken advantage of at any time, even in this court. *Terry v. Railroad*, 236.
2. Where a jury decide correctly a question of law improperly left to them, the verdict cures the error of the court. The legal question of negligence was properly decided by the jury in this case. *Id.*
3. An omission to give a charge to which a party would have been entitled is not error, unless the same was requested on the trial and refused. THE CODE, § 412, construed. *Fry v. Currie*, 436.
4. While exceptions to a judge's charge may be taken at any time and need not be in writing (THE CODE, § 412-3), yet the party complaining must make his exceptions and point out the alleged error. *State v. Ellason*, 564.
5. This court will not look into the testimony to see if the jury found a defendant guilty without sufficient evidence. This is matter addressed to the discretion of the court below on motion for new trial. *Id.*

JUDGE'S CHARGE:

- Upon effect of voluntary deed, 265 (6).
- On negligence, 276 (4).
- In libel suit, 444.
- In murder—see homicide.

JUDGE GOING OUT OF OFFICE, new trial, 4, 329.

JUDGE MAY AMEND WARRANT, 532, 533.

JUDGMENT:

1. A judgment by default for want of an answer, where no complaint is filed against a new party, is irregular and may be set aside at any time. *Vass v. Building Association*, 55.
2. A court of equitable jurisdiction, in proceedings to review judgments at law or final decrees in equity, does not proceed upon the ground that they are erroneous, either in fact or in law, but simply where they are unconscientious and their enforcement would be a fraud. *Graham v. Kennedy*, 148.
3. A judgment obtained by fraud is not, strictly speaking, the judgment of the court. *Id.*
4. Reasonable diligence and good faith are required in applications for relief in such proceedings, and it will not be granted if material matters were omitted from the former case, which were known or might by reasonable diligence have been known at the time of the trial. *Id.*
5. Married women and infants are estopped by judgments, in actions to which they are proper parties, in the same manner as persons *ad juris*. *Id.*
6. Where a record is informal and embodied in the minutes of the court, but from the minutes a formal record can be drawn, it is sufficient for the purposes of estoppel. *Id.*
7. Where, in 1835, land was divided under regular proceedings for that purpose, to which the plaintiffs and defendant in this action were parties, and each was put into possession of the share allotted to him, and it was afterwards attempted to set aside such proceedings on the ground that the present defendant was not a tenant in common when the proceedings were had; *It was held*, that as no fraud was alleged in the partition proceedings, and as the facts now alleged should have been then known, the plaintiffs are estopped, and equity will not aid them, although some of the present plaintiffs, at the time of such partition, were infants, and some were *femes covert*. *Id.*
8. A nonsuit cannot be entered after judgment. *Mauney v. Long*, 170.
9. While judgments should be signed and entered in term time, yet where parties consent that the same may be signed by the judge after the term has expired, and entered as of the term, it is not irregular. The transactions in reference to the sale of land in this case were fair and just. *Shackelford v. Miller*, 181.

10. A judgment in a former action, to operate an estoppel, must be between the same parties and directly rest upon the precise issues and matters in difference in the second action. *Williams v. Clouse*, 322. See also *Temple v. Williams*, 82, and *Wood v. Sugg*, 98.
11. A rule which declares that a judgment is conclusive of everything that *might* have been litigated in the action must be interpreted as applying only to the particular issue or matter *actually* determined therein. *Id.*
12. A judgment consisting of several independent parts may be good as to one part and erroneous as to the others. *Moore v. Ingram*, 376.
13. Judgment against administrator founded on debt of intestate contracted for purchase of land, is not alien on proceeds of sale of such land. *Id.*
14. No judgment can be rendered against a personal representative where he is not a party of record, as such. *Urry v. Sutt*, 406 (2).

JUDGMENT :

- Estopped by, 88 (3), 93.
- In claim and delivery, 215 (3).
- Examination of record of, 272.
- When action on, barred, 304.
- Must be entered upon verdict adverse to defence set up, 423 (3).
- When irregular in attachment proceedings, 483.

JUDGMENT QUANDO, when action on, barred, 304.

JUDICIAL NOTICE of degree cannot be taken without proper pleading, 78 (2).

JURISDICTION :

1. If the county designated in the summons be not the proper county to try an action, still the trial may proceed unless the defendant, *before the time of answering expires*, demand in writing that the case be removed to the proper county. THE CODE, § 195. This statute applies to actions for the recovery of real estate, as well as to personal actions. *Lafoon v. Shearin*, 370.
2. Where the sum demanded in good faith exceeds two hundred dollars, the superior court has jurisdiction. *Urry v. Sutt*, 406.
3. An action for a breach of a contract entered into between a United States marshal and his deputy, by which the former agreed to pay the latter a certain proportion of fees received, is cognizable in the state court, and it was error in the judge to remove the same to the federal court for trial. The action is to enforce an alleged individual obligation, and does not come within the scope of the statutes in reference to removal of causes. *Selzer v. Douglass*, 426.
4. The inferior and superior courts have concurrent jurisdiction of all offences whereof jurisdiction is given to the inferior court. THE CODE § 1201. *State v. Speller*, 526.
5. These courts have jurisdiction of an indictment containing two counts—first, charging an assault with a deadly weapon, and secondly, an assault and battery; and a finding by the jury of “not guilty” on the first, but “guilty” on the second count, will not oust the jurisdiction—approving *State v. Ray*, 89 N. C., 587, and the case therein cited. *Id.*

6. Where courts have concurrent jurisdiction, that court possesses the case in which jurisdiction first attaches, as here, by the finding of the indictment. The fact that defendant was bound over to one of said courts and the return of the warrant made, does not necessarily give jurisdiction to such court. *State v. Willford*, 429.

JURISDICTION:

- In claim against the state, 45.
- In construing wills, 282.
- Over infants, 359.
- Over application of proceeds of sale, 876.
- Of justices of the peace, 444.
- In special proceedings, 496.
- In assault and battery, 617, 624.

JURY:

1. A tenant by the courtesy initiate is a freeholder in the sense of that term as applicable to the qualification of jurors. *State v. Mills*, 581.
2. The name of J. L. B. summoned as a juror, was entered on the scroll as "J. S. B.;" *Held*, to be immaterial, since the use of a middle letter forms no part of the name. *Ib.*
3. A juror upon *voire dire* stated that he had said it would injure any attorney politically with certain persons to appear for the prisoner, and the prisoner's counsel asked him to name them; *Held*, that the court properly ruled, that to know the names of those persons was not material to the juror's indifference. *Ib.*

JUSTIFICATION OF SURETY TO APPEAL. See APPEALS.

JUSTICE'S WARRANT, may be amended in superior court, 582, 586.

LANDLORD AND TENANT:

1. A lease of land made by a tenant for life terminates at his death, but by statute the lease is continued to the end of the current lease-year that the tenant may gather his crop. *King v. Pascoe*, 116.
2. But, in such case, the remainderman is entitled to a part of the rent proportionate to the part of the year elapsing after the termination of the life estate to the surrendering of possession to the remainderman. *THE CODE*, § 1749.
3. The statute embraces a lease for a single year, though it provides in terms "for any lease for years." *Ib.*
4. The legislature has power to regulate the method of transfer of property from one to another and hence the act above mentioned is constitutional. *Ibid.*
5. Where an agency is denied or repudiated, no demand upon the agent is necessary before suit brought. *Ib.*
6. A lease provided that in case the lessee quit the premises during the term, or fail to pay the rent reserved, the improvements put on the premises by the lessee should become the absolute property of the lessor; and also,

that at the expiration of the term the lessee should have the right to remove all the improvements put up by him upon complying with all the terms of the lease. The lessee failed to pay rent, and the lessor entered and took possession of the improvements; *Held*, in an action by the lessee for a violation of the provision allowing the removal of the improvements, that he could not recover. A party exercising a legal right under a contract cannot be subjected to an action for damages for asserting it. *Stamps v. Cooley*, 816.

7. Equity never relieves against a penalty for the purpose of allowing an action for damages; so, in this case, if the forfeiture of the improvements be a penalty, equity will only relieve to the extent of allowing the lessee to remove them. *Id.*
8. In ejectment, the summons issued against the defendant, who was a lessee and the only person in possession of the land; *Held*, after judgment for plaintiff and ejectment of defendant, a party alleging himself to be the landlord of the defendant cannot, by motion, be let in and allowed a writ of restitution. Such party can assert his right to the possession by bringing a new suit against the plaintiff. *Edwards v. Phillips*, 355.

LAPPAGE, 135.

LEASE OF LAND, and possession, 116, 816.

LEGACIES, payment of, 63.

LEGISLATIVE POWER:

Over marriage relations, 293.

Over taxes, and collection of same, 125, 116 (4).

LIBEL:

Upon trial of an action for libel, it appeared that the libelous matter was contained in a newspaper and was, in substance, that the plaintiff, a justice of the peace, issued a warrant for the arrest of one D., charging him with an assault with intent to commit rape, and "after his style of dispensing justice converts the case into an assault and battery, and discharges the offender upon payment of costs, which was \$30," and that the plaintiff's purpose was to secure his fees; otherwise the offender would have been bound over to court; and the defendant pleads justification; *Held*,

- (1) Evidence that plaintiff retained moneys in other cases disposed of by him (which belonged to the school fund) in the exercise of his judicial functions, is admissible to show his habitual abuse of authority for private gain, upon plea of justification of charge imputed to plaintiff.
- (2) The charge of the court that plaintiff had no jurisdiction to try such case, other than to bind over after a preliminary examination into the facts, was not erroneous. *Davis v. Lyon*, 444.

LICENSE:

Of drummer must be in his actual possession, 16.

Tax by town, 554.

LIQUOR SELLING, 550, 626.

LIVE STOCK, injury to, 640.

LOST RECORDS, proof to establish, 231, 331, 465 (6).

MARRIAGE :

1. Marriages between persons nearer of kin than first cousins (here an uncle and niece) followed by cohabitation and birth of issue shall not be declared void in any proceeding after the death of either of the parties thereto. The power of the court to declare such marriage void, is confined to cases where the parties are living; for a decree of nullity affects their personal status or condition. *Batty v. Cranfill*, 238.
2. It is competent for the legislature to impose, and therefore to remove conditions in respect to the marriage relation, the subject being one of legislative regulation. Acts of assembly reviewed by SMITH, C. J., and their retrospective operation discussed and upheld. *Id.*

MARRIAGE LICENSE :

1. A register of deeds is not permitted to issue a marriage license, where one of the parties is under eighteen years of age, until the written consent in writing of the person under whose charge he or she is, *shall be delivered* to the register. The written consent is a condition precedent to its issue. *Coby v. Lewis*, 21.
2. Therefore where the register delivered a license complete in form to one with instructions not to give it to the parties until the mother's consent in writing was given (which was necessary here), and it was never presented to the mother or her consent obtained, but the marriage ceremony was performed under it; *Held*, that the register is liable to the penalty of \$200 prescribed by section 1814 of THE CODE. *Id.*

MARRIED WOMEN :

When estopped by judgment, 249 (4).

Deed of trust for benefit of—upon death, heirs take, trustee not necessary, 159.

MIDDLE NAME, not material, 581 (2).

MISDEMEANOR, what by statute, 561.

MISNOMER OF CORPORATION, 464.

MORTGAGE :

1. A chattel mortgage conveying a bale of good middling cotton which the mortgagor "may make during this year" passes no title; first, because it fails to designate the place where the same is to be produced; and secondly, because it does not identify the property so that it could be separated from other property of like kind raised by the mortgagor. *Atkinson v. Graves*, 99.

2. Such instrument is in effect an executory contract, giving to the mortgagee only a chose in action, or right to sue for the value of the cotton, if not delivered. *Ib.*
3. Where a mortgage is made to indemnify one against loss by reason of becoming surety upon a note executed to negotiate a loan to carry on business, and the mortgagor makes default; *Held*, that while a provision in the deed rendering the property liable for "no more than \$5,000" is a limitation upon any increase of the debt, yet interest is recoverable as an incident to the debt. *Stafford v. Jones*, 189.
4. Where a deed of trust, made to secure a series of notes due at different times, provides that in default of payment of the same or any part thereof at maturity, then the whole shall become due and payable; *Held*, the only effect of the provision is to allow foreclosure upon a default, the proceeds to be applied to all the notes at once, and not to start the running of the statute of limitations, against the notes not due, from the time of such default. *Capehart v. Dettrick*, 344.
5. The limitations prescribed for personal actions do not apply to the remedy afforded in a court of equity by a foreclosure; *hence* where a debt, which is barred by the statute, is secured by a mortgage or any collateral security which is not barred, the mortgagee may enforce the remedy by foreclosure proceedings, or his lien upon the collaterals. *Ib.*
6. The statute of limitations defeats the remedy but does not discharge the debt. *Ib.*
7. In this state a mortgage is not considered as merely subsidiary to the debt but is a direct appropriation of property to its payment, and may be enforced by a direct proceeding to subject the property in satisfaction thereof, without reference to the personal remedy which is given by the note. *Ib.*

MOTION, 325.

"MUD CUT"—See *Saltbury v. Railroad*, 490.

MURDER. See HOMICIDE.

NAVIGABLE STREAMS, 637, 638.

NEGLIGENCE:

1. The rule announced in *Phifer v. Railroad*, 89 N. C., 311, that a stipulation in a bill of lading, given by one of an associated through-line of common carriers to transport goods beyond its own line, to the effect that if damage to same be sustained by the shipper, that the company alone in whose custody the goods were at the time of the loss shall be answerable, is affirmed. *Weinberg v. Railroad*, 31.
2. The decision in *Roberts v. Railroad*, 88 N. C., 560, to the effect that the measure of plaintiff's damages in an action against a railroad for killing a cow, is the difference between the value of the animal, living, and of its dead body as beef, is approved. *Boing v. Railroad*, 192.
3. A new trial is awarded upon the issue as to damages, but the findings upon the other issues will remain undisturbed. *Ib.*

4. Where plaintiff shows damage for defendant's act, which act with the exertion of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence; and proof of care on the part of the defendant, or of some extraordinary accident which renders care useless, is required to rebut the presumption. *Moore v. Parker*, 25.
5. In an action for damages, in which the defendant tenant of plaintiff is charged with negligence in burning the plaintiff's house, the fire being communicated by a stove-pipe passing through the weather-boarding; *Held*, that the plaintiff's knowledge that the pipe was thus placed in the building, does not relieve the defendant from showing proper care in the use of the stove on the particular occasion. *Ib.*
6. The court intimate that running the pipe through the wall without separating it from the wood by some non-combustible substance, is itself an act of negligence. *Ib.*
7. The defendant's instructions in reference to ordinary care were given in substance, though not in the very words of the prayer; and the question of law erroneously submitted to the jury being correctly decided, the verdict cures the error. *Ib.*
8. A servant cannot recover damages of the employer for an injury resulting from the alleged negligence of the latter, when the servant's want of ordinary care contributes to the injury, or where by the exercise of such care he might have avoided the injury. The facts of this case show that the brakeman, the plaintiff's intestate, was guilty of contributory negligence in attempting to board the train while in motion. *Chambers v. Railroad*, 471.

NEGLIGENCE:

Legal question of, properly decided by jury, cures error of court in submit it to them, 236 (3).

Damages recovered by administrator, to whom payable, 308.

Consequential damages, 490.

NEGOTIABLE INSTRUMENTS:

1. Plaintiff delivered to an attorney for collection a bond endorsed in blank by the payee, and the attorney transferred it to the defendant who paid full value and without notice of such professional relation; *Held*, that plaintiff cannot recover upon the bond as against the defendant. *Bradford v. Williams*, 7.
2. Where a bond was placed in the hands of a co-obligor for delivery, without condition or instructions, and he subsequently erased the name of one of the signers before delivering it to the obligee and without his knowledge or consent; *Held*, that the bond is not vitiated. *Railroad v. Kitchin*, 30.
3. In such case the co-obligor acts as the trusted agent of his associate obligors, and his abuse of the trust in altering the bond does not relieve them from liability upon the same. *Ib.*
4. Where one of two persons must suffer loss by the fraud of a third person, he who first reposes the confidence must bear the loss. *Ib.*
5. A note valid in its origin is not affected by the illegality which vitiates a contract made in reference to it. *Wilkinson v. Logan*, 449.

6. The assignee of a note not made payable to order or bearer, but to the payee alone, can maintain an action upon it; and so can the owner when there is no written assignment. *Ib.*
7. The taking up the note of another by a stranger to it may be as a purchase or as a payment, and whether it is the one or the other must depend upon the facts of the transaction as given in evidence. *Ib.*

NEW ACTION, 355.

NEW PROMISE :

Must be unconditional to remove bar of statute and revive contract, 83.

NEW TRIAL :

A new trial will not be granted where it appears that the papers constituting the record of a case in the court below were carried off by the judge and mislaid, and the judge has gone out of office. The appellant should first make an effort to have the papers returned to the court below, for until the filing of a transcript of the record here, the application for a new trial cannot be entertained. (This case does not fall within the provisions of section 550 of THE CODE, or the rule laid down in the cases here cited). *Nichols v. Dunning*, 4.

NEW TRIAL :

Upon issue as to damages, 199 (2).
Where judge goes out of office, 829.
When granted by supreme court, 570.

NON-RESIDENT :

Shares of stock not taxable, 454.

NONSUIT :

Cannot be entered after judgment, 170.

NOTICE :

Of decree cannot be taken judicially, but must be pleaded, 78 (2).
Evidence of contract, 640.

OBLIGOR AND OBLIGEE, 39.

OBSTRUCTING ROAD, 566, 687.

OFFICIAL BOND :

The sureties on a clerk's official bond, executed before THE CODE went into effect, are not liable for a default of their principal in the management of a fund which came into his hands as receiver where the order of appointment does not name him as clerk. But such bond, under THE CODE, § 72, 1586, protects interests confided to clerks when appointed receivers. *Syme v. Bunting*, 48.

OPENING AND CONCLUSION, 214.

ORDINARY CARE, 276 (4).

PARENT AND CHILD, 142 (4).

PAROL EVIDENCE:

- To locate land, 256 (3).
- Of custom, 839 (3).
- Of notice, 640.

PARTIES:

1. One who is interested in the result of a suit and employs counsel to attend to it, is not thereby made a party of record; nor does a published notice requiring him to plead have that effect. Such one is not judicially known in the case, and therefore not exposed to judgment. *Davis v. Higgins*, 282. See also page 376 (3).
2. When the plaintiff transfers his interest in the subject matter of controversy, the cause may still proceed in his name, or the assignee may be allowed to be substituted in his place. THE CODE, § 188. *Id.*
3. And if such plaintiff sues *in forma pauperis* and the fact of his assignment is properly brought to the notice of the court, the action will be dismissed, unless security be given for its prosecution. *Id.*

PARTIES:

- When the state is necessary, 45.
- In suit against administrator, 181.
- Defect of, must be pleaded 406, (4).
- Interest of, sufficient to bring suit, 490.

PARTITION:

1. Co-tenants in reversion or remainder have no right to enforce a compulsory partition of land. The petitioner must show that he has an estate in possession whereby he may enjoy the present rents. *Wood v. Sugg*, 93, and *Osborn v. Mull*, 203.
2. The *feme* plaintiff and her husband made a verbal agreement with the *feme* defendant and her husband to divide the land acquired through the *femes covert*, and the same was accordingly done and mutual deeds executed conveying the share allotted to each, but without the privy examination of the wives. The marriages took place prior to the act of 1848, (THE CODE § 1840) and there were children born alive; *Held*,
 - (1) The husbands are tenants by the courtesy initiate, and have the right to convey their interest without the signature and privy examination of their wives.
 - (2) It was competent to make the division in such case, and it must stand at least until one of the husbands shall die, and each is estopped by his deed to deny the title of the other in the part so conveyed. *Osborne v. Mull*, 203.

3. Partition can be made only by tenants in common who are seized of the freehold, and not by those in remainder or reversion. *Wood v. Sugg, ante*, 98. *Ib.*

PARTITION OF LAND, by will, 256.

PARTNERSHIP:

1. Partnership effects must be appropriated to partnership debts, to the exclusion of claims of a creditor upon a member of the firm. And the rule is the same, where they are assigned by mortgage to one who has knowledge of their character and is a creditor both of the firm and of an individual partner. *Strauss v. Frederick*, 121.
2. In such case the law makes the appropriation, and the creditor cannot elect, even with the concurrence of the surviving partner, as in this case, to make a different disposition of the effects to the prejudice of the estate of the deceased partner. *Ib.*
3. Letter of partner, evidence, 389.

PENALTY:

- Drummers selling without license, 16.
- Register of deeds issuing marriage license contrary to law, 21.

PERJURY, evidence in, 629.

PERSONAL PROPERTY, tortiously taken, 477 (2).

PETITION TO REHEAR, 76, 108.

PLAINTIFF'S transfer of interest pending suit, 382, (2).

PLEADING:

1. Where a complaint was filed against the defendant, and in the progress of the action another party defendant is brought in, the complaint must be amended or another complaint filed as to him, unless he waive his right to the same by answering the original complaint. *Vass v. Building Association*, 55.
2. A complaint which alleges that a certain matter was within the personal knowledge of the defendant, is not met by an answer "that defendant has no knowledge or information sufficient to form a belief" in reference to it. The ruling of the court below that the answer admits the plaintiff's cause of action and offers no sufficient defence, is approved. *Gas Machine Co. v. Mfg. Co.*, 74.
3. During the pendency of a special proceeding against an executor for an account, it appeared that the will of the testator "was revoked and annulled" by a decree of the probate court in another proceeding; *Held*, that the defendant executor must amend his answer by setting up such decree. The granting of the defendant's motion to dismiss for want of jurisdiction was erroneous. *Daniel v. Bellamy*, 78.

4. The court in such case cannot take judicial notice of a decree rendered by it in a separate and independent action, but the party seeking advantage thereunder must plead it in a proper manner. *Ib.*
5. No variance between allegation and proof is material unless it actually mislead the adverse party; *Hence* where plaintiff sues upon a bond, which by virtue of previous transactions was in the hands of one of the defendants, alleging the amount thereof to be "\$550 or thereabouts, dated January 8th, 1860; and the bond introduced in evidence by the defendant was for \$549, dated January 8th, 1860; *Held*, no variance. *Urry v. Sutt*, 406.
6. An objection for defect of parties must be raised by proper pleading. *THE CODE*, § 242. *Ib.*

PLEADING:

In suit for legacy, 63 (2).

In agency, 108.

Contract of corporation must be set up, 421.

POLLING JURY, 654.

POWER:

Coupled with an interest, 70 (2).

To amend justice's warrant, 532, 536.

PRACTICE:

1. Rule 6, (80 N. C., 600) regulating the practice in the superior courts, commits the order of argument—and this embraces the matter of introducing evidence—to the discretion of the presiding judge, whose decision is not reviewable on appeal. *Austin v. Secrest*, 214.
2. In criminal cases, 599.

PRELIMINARY EXAMINATION, 606.

PRESUMPTION OF GRANT, 11, 331.

PRINCIPAL AND AGENT. See AGENCY.

PRIVILEGED COMMUNICATION, 590 (5).

PRIVY EXAMINATION, 203.

PROBATE COURT:

Practice in, 78.

Abolished, 498.

PROBATE OF DEED, 382.

PRODUCTION OF DOCUMENTS, 215 (2).

PUBLICATION:

In attachment, 481.

Service of process by, 483.

PUNISHMENT, not test of felony, 561,

PURCHASER, affected with equity, when, 160 (3).

QUANDO JUDGMENT:

Not a new cause of action—statute of limitation in reference thereto, 340.

QUANTITY OF LAND:

When an important element in locating, 256 (4).

RAILROADS:

1. A railroad company, in the repair of its road-bed at a point several miles above the plaintiff's mill, caused large quantities of mud to be washed down into a creek, by the process of sluicing, thereby lessening the volume of water used in operating the plaintiff's mill and causing the damage complained of; *whether* the company is liable in such case for consequential damages growing out of the exercise of a right conferred in its charter—*Quære*. But if the power was exercised recklessly and without due regard to the interests of others, the company would be liable for the resultant injury. *Salisbury v. Railroad*, 480.
2. The possession and working of the mill by the plaintiff without interference, after as before his conveyance of the land (upon which was the mill-site,) to a trustee for the benefit of his wife, afford *prima facie* evidence of such a personal interest in its operations as entitles him to maintain his action for the damages he himself has sustained, notwithstanding the trustee may sue for such damages as may affect the land as an inheritance. *Id.*
3. This action is not for compensation for land appropriated by the company, but seeks remuneration for a special injury occasioned by an alleged wrongful act. *Id.*
4. In a suit against a railroad company for damages alleged to have resulted from the action of the conductor in ejecting the plaintiff from the train, it appeared that the plaintiff got on the train at a certain station to go to the next station about four miles distant, without a ticket or money to pay his fare. About twenty-five other persons took the same train to go to the same place, one of whom, as it was shown on the trial, promised to pay the plaintiff's fare before they got on the train, but he did not sit in the same car with the plaintiff. In taking up tickets and collecting fare from passengers, the conductor was told by the plaintiff that he had neither money nor ticket, but would get the money if allowed to go into the rear car and see a fellow-passenger. The conductor said "I have no time to wait, you must get off," and thereupon pulled the bell-rope, stopped the train, and put the plaintiff off. The train had made about

half the distance between the stations; *Held*, (MERRIMON, J., dissenting,) that the plaintiff was entitled to recover. The conductor should have allowed him a reasonable opportunity to pay his fare; but an offer to pay (and declined by the conductor) after the train was stopped will not entitle him to return to his seat. *Clark v. Railroad*, 506.

RAILROADS:

Negligence of, in transporting goods, 81.
Killing cattle, 199.
Killing persons, 308, 471.
Contract of, 83 (2).
Suit against, in corporate name sufficient, 418.
Non-resident's stock in, not taxable, 454.

RECEIVER:

Clerk's bond liable when appointed, 48.
See also 221 (8).
When appointed for ward's estate, 82.

RECITALS:

In sheriff's deed, evidence, 172.

RECORDS:

In rough minutes of court, 149 (5)

RECORD-LINKS:

Supplied by presumption, 331.

RECOUPMENT, 399, 400.

REFERENCE AND REFEREE:

1. The proper method of stating the account in this case is to credit the contract price of the land with the value of all deductions allowed by the court—the difference being the true amount of the indebtedness; and then to compute the interest thereon subject to subsequent credits from payments or otherwise. *Knight v. Houghtalling*, 248.
2. In a reference under THE CODE, the referee reports the evidence and his findings of fact therefrom and his conclusions of law. Upon exceptions filed, the judge reviews the findings of fact and law—the findings of fact by the judge being conclusive, and his conclusions of law reviewable on appeal; but if the judge does not find the facts, it is presumed he accepts those found by the referee. *Barcroft v. Roberts*, 363.
3. The facts found in a reference are conclusive, unless it should appear they were found without evidence or upon improper evidence. *Uery v. Sull*, 406.
4. As it nowhere appears in the record that the plaintiff, in her representative capacity as administratrix, was made a party, it was proper in the court below to refuse judgment affecting her as such. *Id.*
5. Cost of reference, 53.

REFRESHING MEMORY, 606.**REGISTER OF DEEDS:**

- Liabie for penalty in issuing marriage license contrary to law, 21.
- Competent witness to prove contents of lost deed, 231.

REGISTRATION:

- Of deed, necessary to complete title, 286.
- Authorized by proof of hand-writing of witness, &c., 382.
- Of contract to convey land, required, 67.

REHEARING:

1. Where the grounds of error assigned in a petition to rehear are substantially the same as those argued and passed upon in the former hearing, the court will not disturb its judgment; nor in such case will an order restraining the collection of an execution upon the judgment be granted *Ruffin v. Harrison*, 76. Nor will a rehearing be granted upon summary motion to modify final judgment. *Ib.*, 398.
2. Petition to rehear must be filed according to the requirements of Rule 12 and section 966 of THE CODE. This case falls within their provisions, and the defendant not having complied with the same, the plaintiff's motion to dismiss the appeal is allowed. *Strickland v. Draughan*, 103.
3. Statute of limitations, its effect upon existing rights, and the legislative power over the remedy, touched upon. *Ib.*

REMAINDERMAN, 116.**REMOVAL OF CAUSE TO FEDERAL COURT, 426.****REMOVAL OF FENCE, 682.****RES GESTÆ, 529 (3).****RETAILING, 550, 626.****REVENUE:**

- Drummer's license, 16.
- Of towns and cities, 554.

ROADS:

1. On trial of an indictment against the Duplin canal company for violation of section 1123 of THE CODE, in placing obstructions in a stream whereby its navigation was prevented; *Held*, that defendant cannot justify under its charter, which expressly prohibits the company from impairing the navigability of streams. Act 1871-'72 ch. 151, § 7, proviso. *State v. Canal Company*, 687.

2. *Held further*, that the use of the water for "sluicing" the canal bed is not using it as a "motive power." *Id.*
3. Obstructing road, 566.

RULES OF COURT, observance of, 153.

SANITY, evidence of, 165.

SECTION 590, see pages 105, 130, 226.

SERIOUS DAMAGE, what is, 617.

SERVICE OF PROCESS BY PUBLICATION, 433.

SET OFF, 390, 400.

SEVERANCE OF TREES FROM LAND, 477.

SHERIFF:

- Collection of back-taxes, 125.
- Recitals in deed of, evidence, 172.

SIGNING JUDGMENT BY CONSENT OUT OF TERM, 181.

SPECIAL VERDICT, what to contain, 566. See VERDICT.

SPECIAL PROCEEDINGS, jurisdiction in, 493.

STATEMENT OF CASE, 596.

STATUTE OF LIMITATIONS:

1. A new promise must be unconditional and in writing, signed by the party and to pay the amount of the original debt, in order to remove the bar of the statute and revive the contract. THE CODE, §172. The exception to the judge's charge in this case cannot be sustained. *Greenleaf v. Railroad*, 33.
2. The statute which bars actions upon judgments after the lapse of ten years from the date thereof, does not apply to actions commenced before August, 1868, or where the right of action accrued before that date. *Gatther v. Sain*, 304.
3. A judgment *quando* (unlike a final judgment) founded upon a right of action that accrued before said date, is now a new cause of action, and hence under section 136 of THE CODE, a suit upon it is governed by the statute of limitations and the law in force prior thereto.
4. Administrator may elect to plead statute of limitations. *Parker v. Grant*, 338.

5. Limitations for personal actions do not apply to remedy by foreclosure. Where a debt, barred by statute, is secured by a mortgage or any collateral security which is not barred, the mortgagee may foreclose or enforce lien on collaterals. *Capehart v. Detrick*, 334.
6. The statute defeats the remedy but does not discharge the debt. *Id.*
7. A party will not be allowed to set up the statute in bar of a debt, where it appears the delay in suing was caused by the promise of himself or attorney that the matter would be settled and no advantage taken of the lapse of time. *Burcraft v. Roberts*, 363.

STATUTE OF LIMITATIONS:

- Legislative power over, 108 (2).
- Administrator may elect to plead, 339 (2).
- When ward not barred by, 407 (7).

STATUTORY CRIMES, 461.

STIPULATIONS, in bill of lading, 31.

"STOVE PIPE," damage resulting from negligence in constructing, 275.

SUPREME COURT:

Upon being informed by the Attorney-General that he has examined the record and consents to a new trial, the court awards the same without looking into the record with a view of forming a judgment of its own. *State v. Valentine*, 7 Ired., 141, approved. *State v. Lee*, 570.

SURETY:

On clerk's bond liable when clerk is appointed receiver, 48.

SURRENDER OF UNREGISTERED DEED, effect of, 286.

TAXATION:

1. It is competent for the legislature to empower sheriff's to collect "back taxes;" and where, as here, the sheriff has made a full settlement and gone out of office, the delinquent tax payer's liability to him is not thereby extinguished. *Taylor v. Allen*, 67 N. C., 346, commented on. *Jones v. Arrington*, 125.
2. A non-resident holder of shares in a corporation in this state is not liable to tax here. Such property is beyond the jurisdiction of the state, and subject only to that in which the holder has his domicile. The ruling in this case has no application to banking corporations formed and operated under the act of congress. *Railroad v. Commissioners*, 454.

TAXATION:

- On fertilizers, 339 (2).
- Of towns and cities, 554.

TENANTS IN COMMON:

Cannot compel partition, when, 98, 204 (2).

TENANT BY THE COURTESY:

Freeholder as applied to qualification for juror, 581.

TORT, may be waived, 477 (3).**TOWNS AND CITIES:**

1. A town has no right to impose any tax but such as is expressly authorized by its charter for purposes of revenue. *State v. Bean*, 554.
2. The power to pass ordinances for regulating the internal affairs of a town- (market regulations and the like), is a police power and does not of itself confer the right to levy taxes. *Ib.*
3. The power to license persons for the privilege of carrying on trades and to require a price therefor, is a police power, but does not give the right to use the license as a mode of taxation for revenue, in the absence of a clear intent in the charter. The license fee must be reasonable and not for the purpose of raising revenue. The power to "license" and to "tax," discussed and distinguished by ASHL, J. *Ib.*

TRANSACTION WITH PERSON DECEASED, 105, 189, 226.**TRANSCRIPT OF RECORD—Eaton's forms, 524.****TRANSFER OF INTEREST by plaintiff pending suit, 382 (5).****TRIAL:**

1. Suggestions of counsel as to what occurred on the trial will not be regarded. This court is confined to the consideration of the record. *Greenleaf v. Railroad*, 38.
2. The defendant, on day after verdict of guilty, moved for new trial upon the ground that his attorney was not present at the time of rendition of verdict so as to demand that the jury be polled, and the motion was refused; *Held*, no error. Whether a new trial should be granted was matter of discretion. *State v. Jones*, 654.
3. Motion for new trial, 436.

TRUSTS AND TRUSTEES:

1. Where a deed is made to a trustee conveying land in trust for a married woman, the legal and equitable title will at her death descend to her heirs since the trustee is no longer necessary, and they have the right to recover the land where they are out of possession at her death, if their estate has not been divested by some superior title. *Johnson v. Prairie*, 159.
2. The assignee of a trustee having the legal title, not required for the purposes of the trust, cannot recover the possession from the owner of the equitable title. *Ib.*

3. Where a purchaser in the necessary deduction of his title, must use a deed which leads to a fact, showing an equitable title in another, he will be affected with notice of that fact. *Ib.*
4. The only effect the transfer by a trustee of the legal estate has on the *cestui que trust* is, that it puts the grantee in an adversary position, and the *cestui que trust* must enforce his right before the statute bars. *Ib.*
5. The grantor, reserving an estate for his own life, conveys land in trust, and provides in the deed that after his death the property is to be held for the use of his wife and grand-son George, and such children as may be born to the trustee (his son James), for and during the lives of his said wife and son; and at his death the land shall be equally divided between the said grandson and such other children as his son may have born unto him; *Held*,
 - (1) That the trustee is liable to an account of the rents and profits, and the plaintiff grand-son is entitled to his share of the same during the life-time of the trustee.
 - (2) If other children are born, they also share in the trust; and at the death of the son, the trustee, the number of all his children can then be ascertained, and the trust determines; and then the land is to be equally divided between the grand-son and such other children as may have been born unto the son.
 - (3) The trustee has no right, in the management of the trust estate, to allow the rents to accumulate and postpone the distribution, as the donor intended that current provision should be made for the beneficiaries. *Albright v. Albright*, 220.
6. Where one is entitled to an account or his right thereto admitted, the court will order it to be taken before trial of issues. *Ib.*
7. The order for an injunction and receiver, upon the finding that the trustee in this case was insolvent and had misapplied the rents and profits, was properly granted. *Ib.*

See also, page 844.

UNDERTAKING ON APPEAL. See APPEAL.

UNREGISTERED DEED, color of title, 382 (2).

USAGE, proof of, 389 (3).

USER OF WAY, 568.

VALUABLE PAPERS, depository of, 26.

VARIANCE, 406 (3).

VENDOR'S LIEN, does not obtain in this state, 376 (4).

VENUE, proper county to bring ejectment, 370.

VERDICT:

1. A special verdict which fails to find the defendant guilty or not guilty as the court may adjudge the law to be, upon the facts found, is defective. *State v. Stewart*, 588.
2. The guilt of the accused must be passed upon by the jury, and though the verdict is dependent upon the opinion of the court as to the law, yet it is none the less a jury-verdict when the question of law is decided. *Ib.*
3. The special verdict in this case, rendered on a trial for obstructing a road is also defective, in that, it does not find that the user of the road by the public was as of right and adversary. *Ib.*
4. It is not essential to the validity of a verdict that the jury be polled. *State v. Jones*, 654.

VERDICT:

- Allowing "interest to date," definite, 84 (3).
- When adverse to defence set up, must be followed by judgment, 422 (3).
- In ejectment, 498.

VOLUNTARY DEED, attacked for fraud, 265.

WAIVER:

- In perfecting appeal, 1.
- In pleading, 55, 63 (2).

WARRANT:

- Of justice may be amended by judge, 582, 586.

WIDOWS' DOWER, 68, 181, 331.

WIFE:

- Fighting in defence of husband, 614.

WILLS:

1. A script, written in a book containing accounts against the decedent's tenants, was found eight months after his death, in a bureau drawer or valise, both of which contained valuable papers, and proved by three credible witnesses to be in the decedent's handwriting and the book was frequently seen by a witness before decedent's death and again the day after his burial; *Held*, upon trial of an issue *devisavit vel non* that the jury were warranted in finding the script to be the will of the testator. *Brown v. Eaton*, 26.
2. Where one has two or more depositories of his valuable papers, the finding his will in either will suffice. *Ib.*
3. The act of assembly (THE CODE, § 2174) requiring copies of wills to be recorded in the county where devised lands are situate, is prospective and refers only to wills proved after November 1, 1883—the time when THE CODE went into effect. (*Curlee v. Smith*, 172.

4. A testator disposes of his plantation, household and kitchen furniture, and makes several money legacies as the "full shares" of the legatees named, and then provides, after payment of debts, "that the remainder of my property be sold and equally divided between my two sons;" *Held*, that the court below erred in holding that the money on hand at the testator's death was undisposed of. The testator did not intend to die intestate as to any of his property. The money on hand and the proceeds of sale of "the remainder of his property" go to make up the residuary fund to be divided between his sons. *Harkness v. Harkey*, 195.
5. A testator, among other things, provides as follows: "What is yet remaining, not above disposed of, shall be held and disposed of for the benefit of M.s' heirs, by my executor, or in such manner as he may deem just and proper;" *Held*, that the concluding words enlarge the discretion of the executor, but the power exercised must be "for the benefit" of the heirs, and not to dispose of the estate so as to divest himself of the attaching trust. *Howell v. Tyler*, 207.
6. Where a bequest is immediate—not dependent upon a preceding limited estate—to the heirs of a living person, and the children of such person are illegitimate; *Held*, they have the right to take, under the act which declares that a limitation to the "heirs" shall be construed to be the children of such person, unless a contrary intention appears. *THE CODE*, § 1829. The ruling in *Thompson v. McDonald*, 2 Dev. & Bat. Eq., 463, commented on. *Id.*
7. "I give to the children of my brother William and my sister Martha one-half of all the money on hand at my death," taken in connection with other provisions in the will, authorizes a distribution of the fund in equal parts between the children of his brother and the children of his sister, so as to carry out the intention of the testator. The general rule is that such limitations will be held to be *per capita*, but the rule will yield whenever a different intention is indicated. *Id.*
8. The sale of the land of the testator by the executor in this case and his purchase of the same through an agent is a nullity. *Id.*
9. A suit for the construction of a devise will not be entertained, where the devisees claim a mere legal estate in the land and no trusts are involved. Cases where the court has given such construction incidentally arising and necessary to the decision of a cause properly before it, reviewed by *ASHE, J.* *Casart v. Lyon*, 282.

WILLS:

- Competency of witness in issue *devisavit vel non*, 189.
 Bequest to adopted child, 142.
 Partition of land by, 256.

WITNESS:

1. A witness party to the action, is not prohibited by section 590 of *THE CODE* from testifying as to communications made to other witnesses. Here it does not appear that the declarations of the witness were made in the life-time of the deceased, or in his presence, if then made; and the court holds that they are in no sense transactions or communications with the person deceased. *Waddell v. Swann*, 105.

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2. Section 580, disabling a party from giving evidence, applies to cases where both parties are living, and does not interfere with section 580. *Id.*
 3. A witness who is a devisee under a script executed in January, is not competent upon trial of an issue *devisavit vel non*, to speak of conversations with the testator tending to impeach a script executed in May thereafter. As the last may be found to be a revocation of the will previously made, such witness is directly interested in the result of the issue, (THE CODE, § 590,) as to which of the two is the will of the testator. *Hathaway v. Hathaway*, 189.
 4. A party interested in the event of a suit is not an incompetent witness under THE CODE, § 590, to prove the *hand-writing* of the deceased person. *Rush v. Steed*, 226.

WITNESS:

Impeaching one's own, 312 (2), 623.

Member of legislature incompetent to prove latent ambiguity in statute, 550.

For prosecution sent to office of prisoner's counsel for examination, such practice not commended, 589.

Ev. H. R. R.

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